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Robert J. Farley

THE ROLE OF LAW IN WORLD POLITICS
Myres S. McDougal

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May, 1949

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The editors of the LAW JOURNAL plan the publication this year of a comprehensive index to Volumes 1 through 20 of the JOURNAL. This index, most of which has already been compiled by members of the JOURNAL staff, will include a table of all cases commented on in the JOURNAL.

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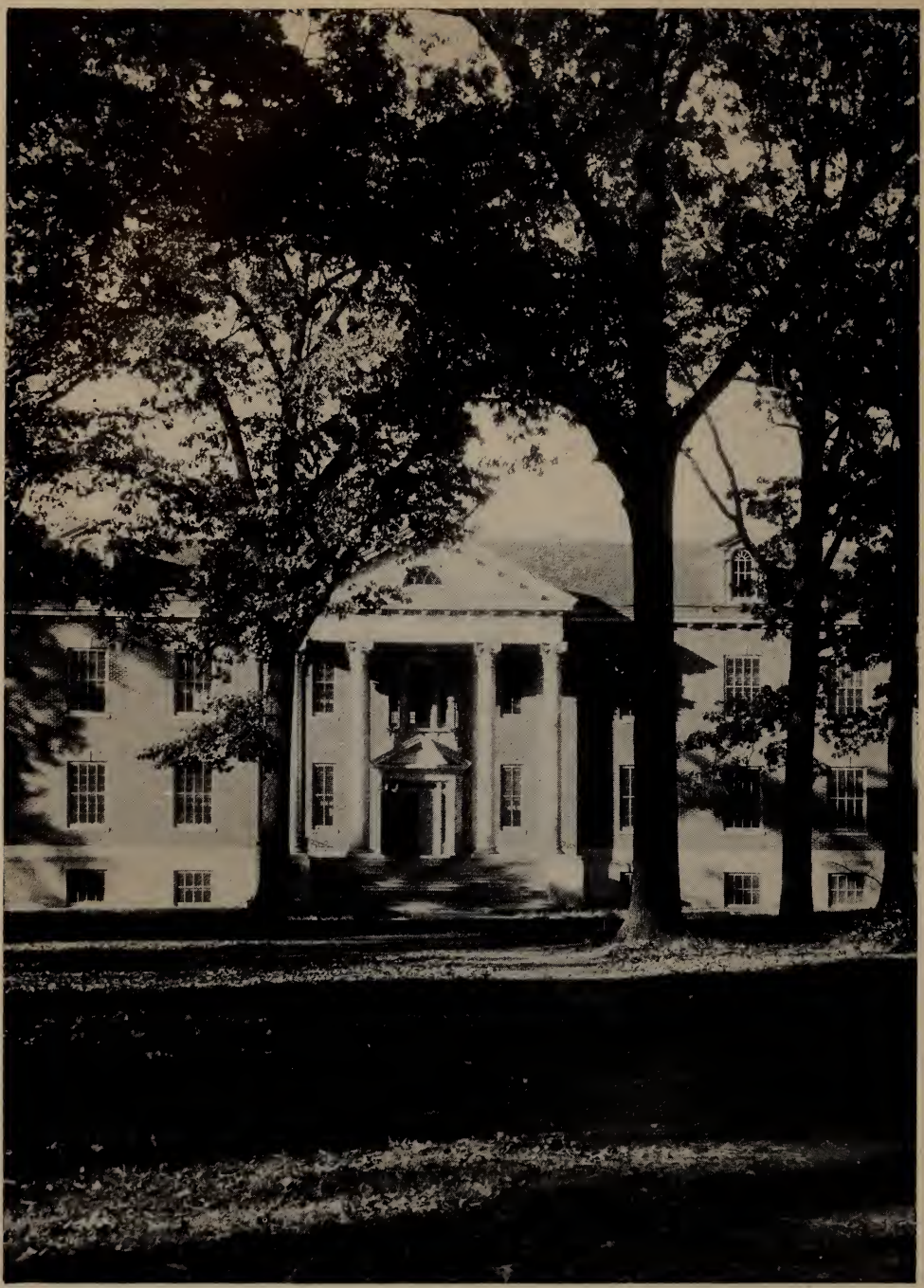

THE LAW SCHOOL

Mississippi Law Journal

JOURNAL OF THE MISSISSIPPI STATE BAR

VOL. XX MAY, 1949 No. 3

THE SCHOOL OF LAW—SINCE 1854

*Robert J. Farley**

While celebrating the one hundredth operating year of the University of Mississippi, it should not be considered bad taste to point out that next to the School of Liberal Arts, the School of Law is the oldest division. Perhaps it is significant that the president of the University at the time of its beginning was Augustus B. Longstreet, former circuit judge of Georgia, who after graduating from Yale studied at famous Litchfield.

In 1854 in response to a memorial of the trustees presented by Honorable Jacob Thompson, the Legislature established a Department of Law, by an act entitled "An Act to Create in the University of Mississippi a Professorship of Governmental Science and Law."[1]

William F. Stearns, LL.D., a prominent member of the Holly Springs bar, was elected to the chair thus created. The prescribed course of study for the degree of Bachelor of Laws was comprehended in two sessions of ten months each. The first class to graduate in 1856 consisted of Benjamin J. Clanton, Panola County; Henry J. Harper, Charleston; Flavious Josephus Lovejoy, Oxford; Charles Purvis Neilson, Greenville; Lafayette Washington Reasons, Calhoun County; and Hugh Eugene Weathersby, Liberty.

In 1857 by legislative act, a diploma in law from the University was made sufficient evidence of learning to entitle the holder a license to practice. This act has continued in force to the present, although at the last session of the Legislature there was some agitation to repeal it.[2]

In 1860 the Legislature by amendment of the charter of the University created a second chair of law to which another member of the bar of Holly Springs was elected, Judge James F. Trotter, who had been successively circuit, chancery and appellate judge. In 1861 all the departments of the University were closed, and in 1867 the Department of Law was reorganized and Lucius Q. C. Lamar, whose biography is familiar to all Mississippians, was elected to the chair which he continued to hold until 1870 when he resigned to enter Congress.

---

*Dean, University of Mississippi Law School.

[1]Miss Laws, 1854, c. 56.

[2]Miss. Code, c. 9 (1857); Miss. Code Ann § 8663 (1942).

The present law building is called Lamar Hall in memory of him. The graduating class of 1867 consisted of one man whose name has become quite well known: Charles Bowen Howry of Oxford, who later became Associate Justice of the U. S. Court of Claims. Colonel Jordan M. Phipps, Judge Thomas Walton, Chancellor Edward Mayes and Justice Albert A. Whitfield, all distinguished alumni of the Department of Law, successively served as professors of law during the intervening period and until 1894. Governor Garvin D. Shands was called to the chair in 1894, and during his administration, on account of the increased attendance and scope of instruction, it became necessary to revive the second chair of law which had been suspended in 1861. This was done in 1897 and Dr. Thomas Somerville of the Winona bar was elected to this chair.

The office of the dean of the department was then created and Governor Shands elected to fill it. Henceforward and until 1921 the Department of Law consisted of a professor of senior law and a professor of junior law. In 1905 Governor Shands resigned to accept the chair of common law at Tulane University, whereupon Dr. Somerville became dean and upon his voluntary retirement in 1913 he was succeeded as dean by Dr. Leonard J. Farley, who had become professor of junior law in 1910. During the intervening time Honorables Clarence L. Sivley and J. Elmore Holmes, both of whom became prominent attorneys in the city of Memphis, served as professors of junior law.

Until 1921 the only emphasis to local practice was gained through occasional lectures (outstanding among whom were Honorables Jehu A. Orr, Horatio F. Simrall and Robert A. Hill,) and trial moot court practice.

In 1921 upon the accession to the deanship of Judge Thomas C. Kimbrough, who had previously succeeded Judge Duke Kimbrough as professor of senior law, the curriculum was increased to the degree that three sessions were required to complete the course. Judge Kimbrough served the longest period of any previous professor or dean. And the Department of Law became known as the School of Law.

The names of the various faculty members who assisted Dean Kimbrough at that time are Judge W. A. Roberds, now on the Supreme Court; Judge D. M. Russell of Gulfport, and the late Judge William Hemingway, who died on November 5, 1937. During his regime the *Mississippi Law Journal* was established, the School of Law became a member of the Association of American Law Schools and gained approval of the American Bar Association. The student body increased to more than 100, and the present building was completed and occupied and the pre-admission requirements set at two years of college training, the curriculum reorganized

and strengthened, particularly in the inauguration of courses in Mississippi Pleading and Practice, both law and chancery.

The School of Law lost its accredited standing during the period 1930-32, during the sometimes called "Bilbo debacle". It was reinstated in December, 1932. During this period Dean Kimbrough was demoted to professor of law and was succeeded by Judge Stone Deavors, an outstanding lawyer from Laurel, Mississippi. During World War II by almost super-human efforts Dean Kimbrough sustained the continuity of the School of Law with the assistance of Messrs. Taylor McElroy, Chester Sumners, Hollis Brown, L. C. Andrews and Chancellor A. B. Butts. Professors John Fox, Glenn Fant and John Wade had entered the military service and Professor Charles Taintor had accepted a position at the University of Pittsburgh. Dean Kimbrough lived to see the accomplishment of his last goal. At the time of his death, December 31, 1945, the continuance of the Law School was assured with the returning veterans having increased the enrollment to forty-five.

For the past two years the total enrollment has been more than 300 students annually under a program which has been accelerated without decreasing its content or class hours, whereby new students are admitted and seniors graduated three times a year. The pre-admission requirement has been increased from one-half to the completion of three-fourths of the work necessary for a bachelor's degree at the accredited institution attended. The minimum requirement for the bachelor of laws degree has been increased from seventy-eight to eighty-two hours.

The library which was somewhat neglected during the lean years of the war has outgrown its physical facilities.

Since there was opportunity for many of the graduates to go directly into the practice on their own and many of them have been doing it, a great deal of thought and attention has been devoted to giving the students experience in applying theory through actual procedures in trial and appellate work, abstracting, drafting of instruments, and office practice generally—beginning in the first year—, such that by the time of graduation there is scarcely an ordinary problem of the lawyer with which the student has not dealt typically. This work has been under the direction of a student board, advised by Professor Bunkley and assisted by Professors Roberts and Dunham. For fear that too great emphasis would be given the practical to the loss of theory and culture, the work of the *Mississippi Law Journal,* also directed by a student board, advised by Professor Ethridge, has been greatly stimulated and strengthened. Also there have been added to the curriculum, aside from such "bread and butter" subjects as Oil and Gas, Workmen's Compensation, Labor Law, and Administrative Law,

courses with a broader outlook, as illustrated by Legal Methods, Legal History, Legal Philosophy, International Law, and Contemporary Legal Trends.

Every member of the faculty by training or experience or both has done some specialization in the field in which he is working. While no pretense is made of being other than a local school, whose primary function is training lawyers to practice in Mississippi, effort has been made to avoid "in-breeding" by selecting full time faculty members with varying scholastic backgrounds. The faculty presently consists of Messrs. John H. Fox, Jr., Mississippi College, University of Mississippi, Yale University, who has practiced in New York City and Jackson; Roscoe Cross, University of Kentucky, Oxford University (Rhodes Scholar) who has practiced in Boston; William N. Ethridge, Jr., University of Mississippi, Mississippi State College, University of Southern California, University of Chicago, who has practiced in Oxford and Jackson; J. W. Bunkley, William and Mary, University of Mississippi; Hector Currie, University of Mississippi, Yale University, Oxford University (Rhodes Scholar), who has practiced in Atlanta; Ford Hall, East Texas Teachers College, Tulane University, now on leave of absence for graduate work at Harvard University; W. L. McLane, Tulane University, Columbia University, who has practiced in New York City; Walter Dunham, University of Texas, Columbia University; L. G. Fant, Jr., Vanderbilt University, Harvard University, who is practicing at Holly Springs (formerly taught full time); Landon C. Andrews, University of Mississippi, who practices in Oxford, former state senator, many times special chancellor; Bramlett Roberts, University of Mississippi, who practices in Oxford, county prosecuting attorney for a number of terms; Corinne Bass, librarian and instructor in bibliography, Newcomb College and Columbia University; and the writer of this article, University of Mississippi, Yale University, who formerly practiced in Oxford.

During the three-year tenure of the writer, the School of Law has enjoyed the finest spirit of cooperation and guidance, within the necessary financial limits of the University, of both Chancellor Butts and Chancellor Williams, which with an incomparable faculty and student esprit de corps has made possible any ostentatious conclusion that may have crept into the above, which was intended to be a mere factual narration.

The School of Law is proud to be a very integral part of a great university at the time of its centenary. The challenge is that in turn the University may take pride in the School of Law during the next hundred years.

THE ROLE OF LAW IN WORLD POLITICS*

Myres S. McDougal†

On June 14, 1946, Mr. Bernard Baruch in presenting the United States Atomic Energy Proposals to the United Nations said: "We are here to make a choice between the quick and the dead." He added: "We must elect World Peace or World Destruction."[1] Today, less than three years later, it appears that mankind may have chosen death and destruction.

From the perspectives of all people who prefer a democratic world order, with freedoms and with peaceful procedures as the primary instruments of social change, the proposals of the United States were most generous. The testimony of the best qualified experts is, furthermore, that these proposals would have brought the peoples of the world the greatest security against violence, aggression, and war that is technically possible.[2] Though accepted and even demanded by an overwhelming majority of nations, these proposals were rejected by the small group of men who rule Russia and its satellites, and who view the world process as a fight to the death between two competing systems.

What the United States proposed has been briefly summarized as follows:

> 1. Establishment of an international authority to be in sole control of all operations classed as dangerous, and to have power to deal with new developments as they arise.
>
> 2. The authority to license, control and inspect all other atomic energy activities left under national control.
>
> 3. The power of veto not to apply either to the day-to-day work of the authority or to the punishment of transgressors.
>
> 4. The control scheme to be put into effect in successive stages, the United States gradually relinquishing, to the extent required by each stage, national control of its atomic activities.[3]

This is the clearest offer for world government by consent that a great power has ever made.[4] Had this offer been accepted and made effective, with all needed ancillary measures, such as control over the dangers of

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*An address delivered at the University of Mississippi on April 6, 1949, as part of the Centennial exercises of the University.

†William K. Townsend Professor of Law, Yale University; alumnus and formerly instructor in Latin and Greek, the University of Mississippi.

[1]First Report of the United Nations Atomic Energy Commission to the Security Council 81 (Dep't State 1946).

[2]This testimony is spread through the volumes of the Bulletin of Atomic Scientists.

[3]Quoted from Friedwald, *The Atomic Deadlock Could Be Broken*, 4 Bull. A. S. 363 (1948).

[4]*Cf.* Nathanson, Review, 41 Ill. L. Rev. 290 (1946).

bacteriological warfare, most of the other issues that today confront the world could have been resolved with relative ease. In the absence of such a minimum world police force, what we have instead is literally anarchy—a world governed not by authority and reason, but by continuing expectations of violence; a world marching steadily toward a new war with all the horrors anticipated from the new instruments of destruction; a world in which there is a growing famine of body and spirit and the prospect of rigorous economic depression; a world in which we see our traditional liberties, and a democratic sharing of power, becoming increasingly precarious in the garrison states deemed necessary to security. An optimist has come to be defined as a man who thinks the future is uncertain.

It is not because of the demands of the peoples of the world that we have come to this impasse. As never before, the peoples of the world are demanding security, in the sense of freedom from expectations of violence, and that wide sharing of power, respect, and enlightenment which we call democracy, and the freedom and opportunity to pursue higher standards of living, health, well-being, comfort, and congenial personal relations—all values that cannot be achieved without a peaceful world order. Conditioned by increasing exposure to the same attitudes (through movies, radio, and newspapers) by growing common skills (those of industrialization), by common character structures around the world, and by the accelerating disappearance of caste and class structures, there is a growing unification of peoples' demands everywhere, and increasing identifications by peoples with larger and larger groups, from locality to world community.[5]

Even the Russians cast their demands in terms of these same basic values and make their demands in terms of a world community. Where they purport to differ is largely in terms of means, of allegedly temporary compromises for greater ultimate fulfilment. Their basic expectations of the future include an inevitable collapse of Western civilization, because of alleged internal contradictions, with perhaps a "dying throes" attack upon Russia, and the replacement of Western capitalist democracy by a dictatorship of the proletariat, necessary *in theory* only to guide mankind to true democracy. It is not difficult, therefore, to see why the Russian elite spurned the American-Western offer of international control of atomic energy, with its beginnings of world government. To accept would have meant to end their hope of ruling the world by means of a tightly disciplined world-wide political party, and, by opening Russia up to a freer flow of enlightenment, might have meant to end their internal power. To accept would have required them to change all the perspectives with which they view the world and all their expectations and hopes of the future.

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[5]Lasswell, *The Interrelations of World Organization and Society*, 55 YALE L. J. 889 (1946).

As frustrating as this deep-rooted intransigence of the contemporary Russian leaders is, the fact must be faced that any hope for the establishment of a world order under law, by peaceful means, depends ultimately upon cooperation from the Russians. I do not claim to dispose of any miracle-working method for securing this cooperation. Like you, I suspect any man who purports to have such a method as either an ignoramus or a charlatan or a dupe in the service of the enemies of democracy. The most that we can do is to seek to clarify the conditions under which a democratic world order under law can be established, to appraise trends in these conditions, and to increase critical awareness of rational methods of escape from the present anarchy.

Coming now to a more direct consideration of the role of law in world politics, much that I have to say may appear painfully obvious. I take comfort in the observation of Mr. Justice Holmes that it is of the obvious that we need most to remind ourselves. With respect to the subject of our discussion, Professor Niemeyer of Princeton has recently remarked:

> There is no reality that is more compelling than the tacit premise conditioning all our actions. There is no force that is as inescapable as the images which dominate the subconscious layers of the mind, just because the issues seem so self-evident, so needless of discussion and consideration. And there is no obstacle that more persistently obstructs any practical progress than basic concepts which have been passed down to us, unrevised and unadjusted from a different age, and which, though outlived, still mold, unnoticeably, a living reality.[6]

It is, therefore, of the utmost importance that we understand quite clearly just what we mean by law, and also what values we seek to implement and effect by law, what factors we assume to condition our action, and what interrelations between law and other means we regard as rational design to secure our ends. In seeking this clarity I propose to break my remarks down under the following headings:

I. Confused Notions about the Relations between Law and Other Variables in the World Power Process.

II. The Traditional, but Unrealistic and Inadequate, Conception of International Law as Doctrine.

III. The Necessity for Relating Law to the World Power Process, If Doctrine Is To Be Made Meaningful and We Are To Obtain Control of All Significant Variables.

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[6] NIEMEYER, LAW WITHOUT FORCE 19 (1941).

IV. How Power Is Shaped and Distributed on the Global Level—Law Defined as Formal Authority Conjoined with Effective Control.

V. The Present Anarchy of International Doctrine and Practice with Respect to Major Democratic Values.

VI. The Conditions that Produced the Contemporary Anarchy and How These Conditions Have Changed.

VII. The Conditions of Democratic World Order under Law.

VIII. Rational Alternatives in a Bi-Polar Power Structure.

You can see that I have not taken my assignment lightly. Considering these points seriatim, let us look first at our existing confusion of thought.

I. Confused Notions About the Relations Between Law and Other Variables in World Power Process

Most of the many proposals for escape from our present impasse commit the fallacy of over-emphasizing some one of the several variables that play important roles in the world power process. Thus, there is a school of functionalists who insist that the quickest way to world government is to promote specialized world organizations, agencies and measures for every purpose other than power or security—such as, for the greater production and sharing of wealth, for the spread of enlightenment, for the protection of civil liberties and the promotion of respect for human beings simply as human beings, for improvement in standards of health and well-being, and so on.[7] Their theory is that if all of these factors are gradually accounted for, it will eventually be possible to establish effective control for maintaining security. Conversely, there is a growing school of "world federalists" who insist that until the power variable is brought under limited control, until there is a moderately effective world police force, it is largely futile to clamor for more and stronger functional organizations.[8] Nation states calculating every international move in terms of its effects on fighting power cannot be expected to do anything consequential on a world-wide scale about the greater production and sharing of wealth, enlightenment, respect, and so on. The world government promoters centered about President Hutchins at the University of Chicago go so far as to insist that anything less than full-blown world government, with a degree

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[7]Mitrany, *The Functional Approach to World Organization*, 24 Int. Aff. 350 (1948); Mitrany, A Working Peace System (1946); Pelcovits, *World Government Now?* 193 Harpers' 396 (1946); *Cf.* Crowther, The Economic Reconstruction of Europe 54 (1948).

[8]Meyer, Peace or Anarchy (1947); Reves, The Anatomy of Peace (1945).

of control over all functions, from this moment on is Utopian.[9] Specialists on character and personality, such as the psychiatrists, urge that all other tinkering with world power processes will be without much avail until we are able to devise methods for producing people who are less sadistic and masochistic, people more capable of respecting fundamental human dignity.[10] A former Assistant Secretary of State, a specialist on communication, has recently referred to "a genuine understanding among the people of the earth" as "still the indispensable condition of a lasting peace."[11] Other specialists tend similarly to emphasize the critical importance of their particular interest and skills. Later I will offer still further examples and suggest a method of analysis which can build upon the valid emphasis in all of these approaches. It may be anticipated that rational action requires understanding of the interrelation of all variables and a workable conception of law. I omit all but a fleeting reference to the groups who overemphasize the possibilities of violence. The horrors and difficulties of a preventive war I assume to be such as to remove it from any serious consideration as a rational alternative.

II. The Traditional, But Unrealistic and Inadequate, Conception of International Law as Doctrine

Turning to our next point, it is well known that the traditional conception of International Law has been in terms of doctrine. The two words are commonly used to refer to a body of rules alleged to have succeeded to the authority of the Pope and Emperor in regulating the relations between states. This basic conception has endured through several centuries and through the greatest variety of justifications for particular systems and rules—justifications in terms of natural law, of the consent of states, of various combinations of these two, of more recent metaphysical, and largely incomprehensible theories of monism, dualism, auto-limitation, and so on.[12]

Typical modern expressions are:

Professor Brierly:

> The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another.[13]

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[9]Katz, *Who Are the Utopians,* 2 Common Cause 285 (1949); Hutchins and others, Preliminary Draft of a World Constitution (1948).

[10]Glover, War, Sadism, and Pacifism (1935); Chisholm and others, *The Psychiatry of Enduring Peace and Social Progress,* 9 Psychiatry 1 (1946). See also West, Psychology and World Order (1945) and Conscience and Society (1942).

[11]Benton, *Education for Peace,* an address before the Phi Beta Kappa Association of Southern California, Feb. 20, 1948. See also Read, Education for Peace (1949) and Ascoli, The Power of Freedom (1949).

[12]A Useful brief history appears in Humphrey, *On the Foundations of International Law,* 39 A. J. I. L. 231 (1945).

[13]Brierly, Law of Nations 1 (3d ed. 1942).

Judge Moore:

> By international law we mean the body of rules which regulate the intercourse of nations in war and peace.[14]

Ambassador Jessup:

> . . . international law or the law of nations must be defined as law applicable to states in their mutual relations and to individuals in their relations with states.[15]

Note that Ambassador Jessup adds that the rules may relate to individuals, but nevertheless continues the emphasis on doctrine. Similar definitions in terms of doctrine could be offered from countless other authorities, ancient and modern.

The important point is that from this conception of International Law as doctrine, most writers, even those with the best of intentions, draw inhibiting and disastrous conclusions with respect to the role of law in the world power process.

Let us look at a few recent examples. Thus,

Sir Hartley Shawcross:

> For law follows order: It does not precede it.[16]

Professor Brierly:

> For law by its very nature is a conservative force.[17]

Professor Brierly ridicules those who "seem to imagine" that law "is a sort of sociological maid of all work" and insists that it is not the function of International Law to regulate the intercourse of peoples across boundaries. It is confined to delimiting the authority of states. Professor Brierly states:

> There are two possible views about the relation of law to this task of organizing for the preservation of peace. It is a question of priority, of whether law is the instrument which we must use for the organization of peace, or one of the benefits that the organization will bring in its train. Professor Kelsen has recently put forward the former of these views in the most uncompromising terms.
>
> "To eliminate war," he [Kelsen] writes, "the worst of all social evils, from interstate relations by establishing compulsory

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[14]Moore, *Fifty Years of International Law*, 50 HARV. L. REV. 395 (1937).
[15]JESSUP, A MODERN LAW OF NATIONS 17 (1948).
[16]Shawcross, *International Law: A Statement of the British View of its Role*, 33 A. B. A. J. 31 (1947).
[17]BRIERLY, THE OUTLOOK FOR INTERNATIONAL LAW 125 (1944).

jurisdiction, the juridical approach to an organization of the world must precede any other attempt at international reform. . . . The elimination of war is our paramount problem. It is a problem of international policy, and the most important means of international law."

It is believed that this view is profoundly mistaken. There is no such phenomenon in human society as "the rule of law" in the literal sense of that term; force rules always, and the question on which the difference between good government and bad depends is always whether force is behind the law or elsewhere. Our common phrase "law and order" inverts the true order of priority, both historically and logically. Law never creates order, the most it can do is to help to sustain order when that has once been firmly established, for it sometimes acquires a prestige of its own which enables it to foster an atmosphere favourable to the continuance of orderly social relations when these are called upon to stand a strain. But always there has to be order before law can even begin to take root and grow. When the circumstances are propitious, law is the sequel, but it is never the instrument, of the establishment of order.[18]

Even more drastic is Professor Borchard:

As force grows in importance, the law recedes.

The assumption of numerous theorists that the weakness of international law is due to the lack of force behind it is responsible for much of the sorry thinking of the present day. International law is a primitive system, not because it lacks the support of force, but because it deals with sovereign states who cannot be coerced by other states without entailing war.

The theorists in their attempt to produce the new order by coercion, are driving out of existence international law, the only law that is able to survive among a congeries of states, none of whom is entitled to pass judgment on the others, and none of whom is able to enforce its judgment without inviting war.

The fact that states in the international constellation differ fundamentally from individuals in a municipal community, and that the method of and procedure for controlling them must of necessity be entirely different, has not been recognized by the

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[18] *Id.* at 73.

seekers of a new world order, romantic chasers of the international rainbow.[19]

It is conceptions like these that cause many people to minimize the effects to be achieved by changes in the structures and processes of both formal authority and effective control at the level of world organization—such, for example, as changes in the veto provisions of the United Nations Charter or in the forces at the disposal of the United Nations.

III. The Necessity for Relating Law to the World Power Process

We come now to our third main point, the necessity for relating law to the world power process. Perhaps the easiest way to document the inadequacies of the traditional conception of international law as *doctrine* is to outline the possibility of a different approach. This approach does not underestimate the importance of doctrine in the world power process. We must recognize that the symbols by which men organize and express all their perspectives (demands, identifications, and expectations) do have a powerful effect on their behavior; psychiatrists are more than flip when they suggest that we all have our pulse-rates organized about a hierarchy of labels of varying degrees of abstraction. The doctrines of international law, in particular, are habitually used by both public officials and private citizens who occupy the greatest variety of power positions, national and international. They are invoked by our executives and diplomats. They are applied by our courts and appealed to by our legislators. The fact that all parties to the current Berlin and other disputes seek to found their actions and arguments in *legality* is testimony to the influence of these doctrines.

It is equally important, however, not to overestimate the role of doctrine. It is an obvious fact that the skilled and informed advocate, whether he is trying to persuade himself or others, seldom need be without a base in legality. The doctrines of international law, like those of national law, have in Mr. Justice Cardozo's apt phrase, the unfortunate habit of traveling in pairs of opposites. How deep antinomy is rooted in international law may be observed by contrasting "sovereignty" with "subjection to law," *pacta sunt servanda* (agreements must be observed) with *rebus sic stantibus* (but not if conditions have changed), and the contemporary illegality of war with the right of self-defense.

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[19]Borchard, *The Impracticability of "Enforcing" Peace,* 55 Yale L. J. 966 (1946). The quotations are not consecutive statements and are taken from various portions of the article.

There is an old story that a philosopher can be defined as a blind man in a dark room chasing a black cat that isn't there. It is sometimes said that the lawyer goes the philosopher one better: He smuggles the cat in under his coat and then emerges to produce him in triumph.[20]

The approach to international law which I am suggesting is not, however, founded upon this simple fact of doctrinal ambiguity. It seeks to take into account also some fundamental lessons from contemporary semantics, personality study, and social analysis and to build upon our now lengthy experience in techniques of democratic, public administration. It assumes that all human response, official and otherwise, is a function of many environmental and predispositional factors, and not merely of words. Among predispositional factors are attitudes, class, skill, and personality or character structure. The environmental factors that may influence a decision-maker include not only the facts of a particular controversy, and the technical legal standards and policy propositions invoked by the parties, but also the whole social or community context in which the decision-maker and parties find themselves. Technical legal words are but one among many variables that affect the response of the decision-maker. To put the point another way, it is an emphasis both of common sense and contemporary semantics that words can be given complete meaning only when located in context. The relevant questions for any communication are who, says what, to whom, under what conditions, how, and with what effects?[21] This truism and these queries are no less applicable to the doctrines of international law than to other statements. To understand these doctrines we must locate them in the total community process of which they are a part.

I should like now to refer to a chart.[22] This chart is an effort to offer a comprehensive presentation of the social process in a community of any size, to outline the total process in which this doctrine commonly called law plays its part. An observer can describe this social process in either one of two kinds of terms, either in terms of value variables or in terms of institutions. In terms of value variables, one may talk of people using power, respect, enlightenment, wealth, or any of the other values, as bases to effect a distribution of these same values among people. People use these values as bases for power by employing certain practices, by applying doctrines and techniques. Hence, further description in terms of institutions is needed, both to indicate in detail just what is meant by such high level words as power, respect, enlightenment and so on, and to describe

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[20]One of Dean Prosser's many creations.

[21]Elaboration appears in Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203 (1943).

just how in fact such values are shaped and distributed in any given community.

Institutions can, as indicated, be broken down into doctrine and application, myth and technique. The organizations of our society can be categorized in terms of government, political parties, pressure groups, and private associations specialized to the production of any of the values.

It is here that we come to law. To acquire the most realistic understanding of law—to obtain the control of all variables necessary to effective action—we must, I submit, define law today in terms of both values and institutions. In terms of values, law is an element of the *power* structures and processes of a community, but any or all of the major values of a community can be used as bases of power. In terms of institutions, law

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CHART I

Community Process:

People,
with
perspectives
identifications
demands
expectations,

using base values

power
respect
enlightenment
wealth
well-being
rectitude
skill
affection

by institutions
(practices)

myth
doctrine
formula
miranda

legal
doctrine

technique

organizational routines
government
party
pressure groups
private associations
non-organizational

to shape and distribute scope values

power
respect
enlightenment
wealth
well-being
rectitude
skill
affection

among

People
with
perspectives
identifications
demands
expectations

is a part of government, that structure of formal authority which includes the officials who are supposed to make the power decisions of a community, the doctrines by which they are supposed to make decisions, and the practices by which they are supposed to apply doctrines. It is common knowledge, however, in most communities that the formal facade of authority seldom represents the whole fact. Behind government or operating through government, the real rulers of a community, the people who make the important decisions, may be located in any one of the other types of institution, and these rulers may be using any one or all of the major values as bases to sanction their decisions. Thus, in Russia real power is obviously in the political party; in this country, in various communities, it is sometimes alleged to be in private business associations. An observer who would obtain a realistic picture of the role of doctrine, including an understanding of all the variables that affect decision, must, accordingly, identify the structures and procedures of both formal authority and effective control. Just what is the formal structure of government in this community, who is supposed to make the important decisions, and by what doctrines and practices? But formal authority without effective control is illusion. Who, on deeper scrutiny, actually makes the decisions, and what effects do they get? Shifting from a descriptive to a preferential perspective, it must be remembered, however, that effective control without formal authority is naked power and anti-democratic. Though to be effective law must include real power, to be democratic it must include formal authority, established on power widely shared. The conception of law to which we, as democrats who wish to be influential, should subscribe is, therefore, that of formal authority conjoined with effective control, and both widely shared.

It is clear, if the above analysis be sound, that any realistic description of International Law must locate both doctrine and practice (how doctrine is applied) in the total world power process in which they play a part in the shaping and distribution of values. The point of present emphasis is that when we think of the social process as people, with all their perspectives (their identifications, demands, and expectations) using any one or all of the major values of their community, by a great variety of institutional methods, as power bases to effect the shaping and distribution of all values, the effective role of doctrine becomes considerably smaller than the traditional presentation of law, whether municipal or international, assumes. From this perspective, doctrine comes to be regarded as composed not of autonomous absolutes but rather of symbols whose functions is to serve the total policies of their users.[23]

[23]More detail on the theoretical structure from which these remarks stem can be found in LASSWELL, POWER AND PERSONALITY (1948). Note especially the Appendix.

IV. How Power Is Shaped and Distributed on the Global Level

It is our task now to apply the general analysis, outlined above, to the world power process and to consider its implications for a useful conception of International Law.

In this connection I should like to draw attention to another chart.[24] To obtain a realistic picture of the world power process, we must identify and describe the participants in that process, the arenas of their influence, the criteria by which they are admitted to participation, the bases of their power, the practices by which they shape and distribute power, and the effects that they get.

Looking comprehensively at the shaping and distribution of power on a global level, we see as the most obvious facts that there is not merely one type of participant in this process, the nation-state, as traditional theory assumes, but at least six different groups of participants and that people in each of these groups employ doctrines and practices differently, depending upon their positions, official and otherwise, the particular events

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CHART II

World Power Process

I. National-States
- A. Admission — legislative, executive, judicial
- B. Bases of Power — people, resources, institutions — Government, Parties, Pressure Groups, Private Associations
- C. Practices — volition, consent, peaceful procedures; violence, coercion, war — diplomacy, agreement
- D. Effects — people, resources, values

II. International Governmental Organizations
- A. Admission-Membership
- B. Bases of Power
- C. Practices
- D. Effects

III. Transnational Political Parties
etc.

IV. Transnational Pressure Groups
etc.

V. Transnational Private Associations
etc.

VI. Individuals
etc.

or controversies with which they are concerned, the bases of their power and the techniques at their disposal, and their objectives. The nation-state is of course still by far the most important participant, but there are in addition international governmental organizations, transnational political parties, transnational pressure groups, transnational private associations (cartels), and individual human beings. The role of the nation-state in the total process is more and more affected by the powers and practices of the other five participants.

With respect to any particular participant it is necessary to ask and answer the same basic questions: How does this participant get admitted to the processes of formal and real power? What are the bases of its power? By what practices does it participate? What effects does it get? How compatible are these effects with the preferences of the observer?

The relevant inquiries may perhaps be made more meaningful by a brief preliminary characterization of the role of the nation-state. States get admitted to the formal processes of world power by a ceremony known as "recognition;" their admission to real power depends upon the bases of their power. The bases of their power can be found in their control over resources (territory, technology, etc.), their control over people, and their control over institutions. In terms of the latter, they have achieved a degree of internal organization and a certain independence of other power groups. The practices by which states shape and distribute power range from diplomacy, agreement, and peaceful procedures generally to the other pole of coercion, violence, and war. The effects that states get by these practices can be described in terms of the control they secure over people, resources, and value processes (wealth, respect, enlightnment, etc.).

Comprehensive investigation would pursue these inquiries and findings in utmost detail with respect to all participants in the world power process. How, for example, do groups get admitted to international governmental organizations? What are the criteria of admission? What is the organization's hierarchy of officials? What access do they have to the formal authority of nation-states? What are the organization's bases of power? By what practices does it operate? What effects does it get? And so on. The world power process, however, not only affects but is also affected by all the other value processes. Hence, once the power process has been outlined and an appraisal made of its effects on other values, it becomes necessary to make comparable study of the structures and processes of the other values (wealth, respect, enlightenment, etc.) and to appraise their effects on the power process.

In every context, realistic study must inquire into the especial role of doctrine, of myth, and seek to ascertain its exact effects on the shaping and distribution of values. It can safely be anticipated, however, as has been

emphasized above, that the attitude toward technical doctrine which any official or decision-maker takes will be found to be largely a function of where he is located in this power structure and of what he is trying to do—that he will be moved by the forum, the arena, he is in, by, for example, whether he is a judge on a national court or on an international court or is an arbitrator in a specially constituted tribunal; that he will be moved by who the parties before him are, what their objectives are, and what his appraisal of their objectives is; that he will be moved by, in other words, all his predispositional factors, and by many environmental factors, as well as by technical, legal doctrine.

The contrasting interpretations of the parties to the Berlin dispute are only dramatic documentation of what must be true, under conditions of world anarchy, in every case. The intention of the parties to a treaty may become as much a will-of-the-wisp to subsequent officials as the intent of legislators or founding fathers in statutory or constitutional construction.[25] Words, as we have seen, must take their meaning from a total context of people, time, conditions, and purposes. Try as they will the living cannot recreate the total context and the intentions of the past. Even if the intentions of the past could be made reasonably certain, the living will disregard interference with their own basic objectives. This difficulty is inherent in any law-making by the past for the present or the future. The living can be expected to preserve some continuity with the past, to exhibit some deference for precedent, but they are likewise always bending their inheritance of canonized doctrine and institutions to contemporary purposes. In the absence of officials to make and enforce interpretations from the perspectives, and in the interests, of the world community, the officials of nation-states can be expected to bend institutions and doctrines to divergent national purposes.

It may be observed, to take an illustration some distance from home, that the attitudes of the Russians toward international doctrines can be traced through a considerable variety of pragmatic tergiversations in recent decades. In the twenties, for example, they were strong for *rebus sic stantibus,* in order to escape their debt problems. Today they emphasize *pacta sunt servanda,* apparently hoping for a relatively peaceful world in which they can carry on their revolutions by infiltration.

Two more concrete examples may help to clarify the limitations of a purely doctrinal approach and to underline a difference between rational and irrational use of doctrine. Without overemphasizing their importance

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[25]The difficulties that inhere in such construction are outlined in McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy,* 54 YALE L. J. 181 (1945).

for the prevention of war, let us look at the Nuremberg trials. There has been a great hullabaloo among lawyers that the Nuremberg trials were illegal and vicious because, it is alleged, the charter for the trials created law after the commission of the offense. I should like to join with ex-Secretary of State Stimson and others in suggesting that this is a very limited view of the legal process. Mr. Stimson says:

> It rests on a misconception of the whole nature of the law of nations. International law is not a body of authoritative order or statutes; it is the gradual expression case by case, of the moral judgments of the civilized world.[26]

Another writer, Professor Meltzer of Chicago, has aptly said:

> To shield the Nazi leaders by applying a principle designed to protect men who acted without knowledge of their culpability would involve a monumental perversion of justice. The mechanical application of a Latin phrase, however important the value it enshrines, should not be permitted to victimize the moral sense of the peoples of the world.
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> Where, as in the case of the Nazi aggression, there has been a grave, deliberate, and flagrant violation of widely accepted standards; where such a violation necessarily involved death and misery for millions, it is more important to condemn and punish such conduct than to follow literally the principle of retroactivity.[27]

The point I would make is this: A decision-maker who seeks to make a rational use of doctrine in the power process, will ask himself this question: Will the judicial trial of the Nazi conspirators, or of the Japanese, do more to promote security in the future than their summary execution or their being allowed to go free? Will such trial do more than any practical alternative, to promote the values that we all have at stake? If so, he will put such values above any kind of a logical exercise or derivation from some mechanical manipulation of a doctrine that was invented to protect private individuals in a national government from the arbitrary power of that government. In other words, the critics of Nuremberg take arbitrarily a doctrine from the national power structure, carry it over into the international, and use it in a new context for completely different purposes from those for which it was designed.

For a second and more technical example, there is a relatively recent case from the Second Circuit Court of Appeals. It is known as the

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[26]Stimson, *The Nuremberg Trial: Landmark in Law*, 25 FOREIGN AFFAIRS 179, 180 (1947).

[27]Meltzer, *Nuremberg Trials*, 14 U. OF CHI. L. REV. 455, 458 (1947).

Bernstein[28] case. Bernstein was a German of Jewish faith who was locked up by the Nazis, and while in jail forced to sign a cession of a steamship line that he owned. One of these ships was then sold to a Belgian corporation which took, with knowledge of the coercion, and bought for a fraction of the value of the ship. The ship was sunk at sea during the war and the proceeds of insurance put on deposit in a New York bank. When Bernstein got out of jail and got to this country, he became an American citizen and sued to collect the proceeds of this insurance. Our Second Circuit Court of Appeals said: it is too bad for Bernstein, but we can not look behind the "act of state" of the Nazi Government. The majority opinion which reached this decision referred to all the acts of our executives, and to all the acts of our military government in Germany, in setting aside such "acts of state" in Germany, and admitted that if those funds had been caught within our jurisdiction in Germany an opposite decision would have been reached. But it lamented, because of this traditional theory that we cannot look behind acts of state, we are compelled to reach our harsh and impolitic decision. If there had been an investigation of the real function of this doctrine of "act of state," of the contexts in which it had been invoked and the purposes for which it had been used along with a consideration of its relevance to the particular problem before the Court, the Court could, as a dissent suggested, have concluded the doctrine was just a misleading analogy or metaphor that had no real bearing on its case.[29]

The important emphasis here, however, is that doctrine alone, no matter how rationally applied, is not enough. Upon the world scene, as upon the national, the formal authority of doctrine without effective control, of doctrine that is not sustained by appropriate organization and the necessary bases in real power, is mere illusion. The importance of clarified doctrine, of technical doctrine that is precisely related by operational definitions to basic values, need not be minimized. But it is an omnipresent lesson not rationally to be ignored, that effective control cannot be had by doctrine only. For the world community as for the nation-state, a workable conception of law must add to formal authority the real power that can bring community coercion to bear for community interest, and must open up for investigation all the factors that in fact influence the application of doctrine.

It may be added, if this conception of law be accepted, that much more doctrine becomes relevant than is traditionally included under the heading of public international law. When one considers the shaping and sharing of power on a global scale, and the effects of the practices outlined, the field

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[28]Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (C.C.A. 2d. 1947), *cert. den.*, 332 U.S. 772 (1947).

[29]The decision is thoroughly and soundly criticised in Comment, 57 YALE L. J. 108 (1947).

includes also what is commonly known as private international law or conflict of laws. These are doctrines announced and applied by national states to limit, in the interest of comity and certain world community objectives, their actual physical control or coercion with respect to territory, people, and value changes. Likewise, the studies traditionally known as "comparative law" become pertinent. The doctrines and practices by which élites in nation-states shape and distribute values not only affect the power of their nation-state in the world arena but also have direct external effects on the values of other peoples around the globe. Just as the formal authority and real power, the doctrine and practices, of the nation-state cannot be realistically studied apart from the world power process, so also the power process of the world community cannot be realistically studied without consideration of the internal structures and processes of its more important component parts. By exposing the degrees of equivalence and non-equivalence, in terms of basic values, in perspectives and practices in the various regions of the world, such study may both intensify the solidarity of peoples (where equivalences appear) and emphasize the necessities and opportunities for compromise (where non-equivalences appear).

It could be noted also, if this conception of law be accepted, that many of the ancient mare's nests of public international law dissolve into semantic quibbles. Thus, the repeated assertions by conservative professors that international *law* is fundamentally incompatible with international *organization,* that the whole notion of a real coercive power on the transnational level is inconsistent with the notion of sovereignty, and that the idea of a world police force rests on an utterly untenable set of contradictory assumptions, stand revealed as a complex of simple verbal confusions. When one thinks of sovereignty as merely the highest degree of formal authority in any group, there is no incompatibility in saying that there can coexist a certain degree of authority in nation-states with respect to the production of wealth and the shaping and sharing of other values, and a still higher degree of authority in a world government with respect to security, the control over violence. Similarly, the continued argument over whether international law is "real" law or not, over whether it has any sanction, becomes futile. It is obvious that all values and a great variety of institutional practices can be and are being used as power bases in different contexts to sanction international doctrines. Sometimes decision-makers have control of wealth, sometimes of real power in the form of force, again of enlightenment and so on; a fruitful approach requires the delineation of the exact role of both doctrine and practice, and of each value used as a base for power. Finally, the often alleged distinction between "legal" questions and "political" questions becomes one not so much of rationality as of arbitrary compromise in specific contexts. The whole function of

legal doctrines is to shape and apply power; they are an integral and indispensable part of that process, ordinarily called "political", by which all values are shaped and distributed. Any other conception of "law" leaves it a functionless "shape on paper or agitation in the air".[30]

V. The Present Anarchy in International Doctrine and Practice with Respect to Major Democratic Values

We come now to the present anarchy in international doctrine and practice with respect to major democratic values. Ideally a presentation of this point would include a comprehensive survey of international doctrine and practice with respect to each of our major values. Let's begin with *power* and look again in brief synopsis at Chart II on the World Power Process.[31]

With respect to the first and most important participants, nation-states, we observe that under present doctrine and practice they are almost completely free from external control, formal or real. In the absence of world community control of coercion, it is, and must be their consistent policy based on "sovereignty" and "nationalism" to maintain this freedom. Participation in and the admission of others to the formal processes of peaceful diplomacy, commonly called "recognition," is still entirely a matter of unilateral discretion. As a recent writer has said, the "simple truth is that it is governed by no rules whatsoever. The fact is that each nation reserves to itself the right to determine its own conditions and reasons for according recognition to a new state."[32] Palestine is a recent example.

Considering bases of power, we observe that territory is still subject to the rule of capture, with complete state control over ownership. In terms of people, there is likewise unfettered state control over emigration and immigration. In terms of institutions, each state is left entirely free to determine what form of government and other organizations it will have, irrespective of consequences to the rest of the world.

With respect to the practices by which *power* is shaped, we find that on the world level we are still in the law of the jungle: that agreements are "valid" though obtained by duress, force, fraud, or coercion; that there is no machinery for the enforcement of agreements on the international level; that the doctrine of *rebus sic stantibus* permits states to get out of agreements pretty much at will; and that there is no legal requirement even that states continue diplomatic relations with each other, that they

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[30]A phrase used in another connection by I. A. Richards.

[31]The summary which follows draws on Dickinson, *International Law: an Inventory*, 33 Calif. L. Rev. 506 (1945), a statement which is both more comprehensive and more detailed.

[32]Brown, *The Recognition of Israel*, 42 A.J.I.L. 620 (1948).

can sever formal communications at will. In other words, the processes for peaceful negotiation and agreement are almost without law. There are a few doctrines about the diplomatic privileges and immunities of agents, but these deal largely with an etiquette designed only to make peaceful negotiations efficient.

Shifting to the other polar mode of shaping and sharing power, violence and coercion, we find, though only very recently, that it is coming to be assumed that aggressive war is illegal. There are the United Nations Charter provisions, the Nuremberg precedent, the Kellog pact, and so forth. Section 51 of the United Nations Charter, however, though imposing certain new conditions of inaction and review by the Security Council, expressly reserves the traditional right to self-defense, and no state ever goes to war except in what it regards or proclaims as self-defense. With respect to the conduct of war, future military necessity is likely to know few limits.[33] The etiquette of conducting hostilities can be expected to change even more drastically than in recent years to conform to the new imperatives of victory. To the newer technology may be added increase in the number of combatants, the receding distinction between civilians and combatants, total mobilization of resources, new developments in aerial warfare, and the advent of totalitarian states. The whole purpose of the new weapons being developed is quick and decisive destruction of an enemy's will and ability to fight and no nation is likely to permit doctrinal obstacles to stand in the way of that objective.[34]

Viewing the effects of "jurisdiction", and of factual power, it is obvious that national states admit only very minor limitations on their control over territory, people and value processes.[35] There are exceptions from control for foreign ships, property of other governments, and occasionally for aliens, plus some few concessions under traditional private international law to encourage a precarious stability in private transactions. A presentation of these effects in broadest terms would require a resume of all the ills of present world anarchy.

The picture is little different for values other than power. Let us take *security,* considered as simple physical safety and freedom from aggressive violence. The failure of all traditional procedures is commonplace history. I have no desire to belittle the achievements of the United Nations, but the limitations of the organization are obvious. Its fundamental weakness could not be more clearly demonstrated than in its inability to settle

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[33]Schwartzenberger, *Patterns of International Law and Organization in the Atomic Age,* 59 JURID. REV. 95 (1947).

[34]SMITH, THE CRISIS IN THE LAW OF NATIONS 67 (1947).

[35]It is here that the domains of traditional "public" and "private" international law overlap with considerable confusion.

the Berlin dispute. Consider what a difference it would make to the world if there were a representative, centralized authority with power to hear both sides and enforce a peaceful resolution of this controversy, securing the reasonable interests of all parties.

Turning to the value *wealth,* despite all the great range of organizations, the World Bank, the ITO, the Monetary Fund, and the specialized agencies of the United Nations, there is really very little being done to increase the efficiency of allocation, planning, and development practices. There is no long-term, comprehensive, and adequate planning and development program.[36] Taken together, the powers of all the related organizations are pitifully limited, and President Truman's Point "4" cannot be expected to fill the gap without a substantial strengthening of world organization.

Appraising trends about *respect* for human dignity, it is obvious that on the world level no protection is yet afforded the individual at all comparable to that secured by some of the best national constitutions. The Universal Declaration of Human Rights, the proposed convention on human rights, and the Genocide Convention are all heartening evidence of a growing unity in the perspectives of the peoples of the world and deserve the vigorous support of all democrats, but even assuming the genuine cooperation of those who dispose of power in nation-states, implementation will be difficult in a world of garrison states . When minimum security is desperately at stake, civil liberties and respect for human dignity can be expected to yield to paramount considerations of self-preservation.

The inevitability of similar conclusions for all other values—for enlightenment (freedoms of investigation and speech and press), for congenial personal relationships (freedoms of marriage and fraternal association), for standards of rectitude (freedoms of religion and scientific orientation), and so on—preclude repetition. In summing up our contemporary anarchy, I should like only to emphasize again the complete lack of any formal authority on the world level that can pretend to effective control over violence and the consequences that this entails for all other values. The world does not have, as the nation-state has, centralized governmental machinery adequate to bring the total coercion of the community to bear upon members who threaten to disrupt its values. Even political parties, pressure groups, and private associations have more effective control on the world level than has government. It needs little emphasis that the world as yet has no real legislature for declaring necessary policy,[37] that it is mocking the word

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[36]A more detailed description of both need and lack appear in McDougal and Haber, Property, Wealth, Land: Planning, Allocation, and Development c. 12 (1948).

[37]*Cf.* Dean, *International Legislation,* 33 A. B. A. J. 878 (1947).

"executive" to suggest that the Security Council of the United Nations is an effective instrument of executive functions, and that, as important as the new International Court is, it is in no sense a court, like our Supreme Court, coordinate with other branches of government and with power to determine compatibility of practices by other branches, and subordinate governmental units, with the basic principles of the United Nations.[38] The word anarchy alone suffices and it is accurate.

VI. The Conditions that Produced the Contemporary Anarchy and How Conditions have Changed

It is familiar history how our contemporary doctrines and practices of international law were made to measure for a world with only a fraction of its present population, with a pre-industrial technology, and with its principal power units very differently organized, and organized for different purposes, from the nation-states of today. Professor Bingham of Stanford has recently made scathing reference to "mechanistic adherence to traditional ill-digested generalities and slogans devised by theoreticians of an unscientific age of subsidized piracy, matchlocks, woodfires and candlelight, wide-open spaces, and glorification of cruel aggressive forces for selfish profit—theoreticians who could have foreseen little of the technology, industries, social pressures, and dominant impulses of our crowded, complex, modern civilization."[39]

From a state of relative *independence,* many fundamental changes—changes in population, changes in the demands and aspirations of people, changes in techniques of organization, and most important of all, changes in technology, a technology which today for the first time makes possible either the total destruction of the world or a centralized world government with hitherto unimaginable creativity—have moved the peoples of the world to a state of more and more inescapable *interdependence.* Speaking about the confusion in our legal thought generally, I had occasion not long ago to attempt a somewhat systematic summary:

> This confusion in legal thinking and action was inherited from a time—to draw the broader context—when Western European civilization was successfully expanding its colonization over the four corners of the globe, annihilating all who resisted or subordinating them as dependents to its imperial power.

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[38]Jessup, *The International Court of Justice and Legal Matters,* 42 Ill. L. Rev. 273 (1947).

[39]Bingham, *The Continental Shelf and the Marginal Belt,* 40 A. J. I. L. 173 (1946).

It was a time when the way of life which we know as private enterprise, with its minimum of community coercion, was free of any deep concern for its own future.

When men could pursue, secure, and preserve *wealth,* and use private wealth as a base for affecting the distribution of other values in the community, without too much regard for their effects on the community or how the community was likely to respond.

When men could pursue *power* and take for granted the stability of the framework within which they worked, without too much concern for the continuation of the values which gave them their power.

When men could pursue *enlightenment* after their own bent, without regard for the consequences—when men could smash an atom without expecting to smash mankind.

When every intellectual and artistic skill could be concerned with itself and its own idiosyncrasies, with a minimal regard for the community process which produced it and which it in turn affected.

When men could demand *respect* for themselves, without too much sensitiveness to the claims of others.

When differing conceptions of *morality,* of right, were developing with a minimum of effort at harmonizing the differences.

It was a time, in still more general statement, of intellectual and moral specialization and atomization, of the pluralization of interests, when each interest made demands for itself with scant consideration of the social context.

When every person, as well as every group and nation, felt relatively secure in pursuit of its own special interests, unconcerned with the larger whole of society.

When people still felt—despite tremendous innovations and changes in technology, in institutions, and in values—no imperative need to assimilate and integrate the great transformations they were experiencing.[40]

It needs no special emphasis to informed people, capable and willing to face facts, that this is a time which has gone forever. So great, however, is the revolution demanded in all our thought and action, in all our perspectives and procedures, it may not be amiss to recall the grim warning issued last summer by the Emergency Committee of Atomic Scientists:

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[40]McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community,* 56 YALE L. J. 1345, 1347 (1947).

> . . . we reiterate here our Six Point Statement published originally on November 17, 1946:
>
> 1. Atomic bombs can now be made cheaply and in large number. They will become more destructive.
>
> 2. There is no military defense against atomic bombs and none is to be expected.
>
> 3. Other nations can rediscover our secret processes by themselves.
>
> 4. Preparedness against atomic war is futile, and if attempted, will ruin the structure of our social order.
>
> 5. If war breaks out, atomic bombs will be used and they will surely destroy our civilization.
>
> 6. There is no solution to this problem except international control of atomic energy, and ultimately, the elimination of war.
>
> Every scientific development in the intervening seventeen months has supported the accuracy of this statement.[41]

Like the atomic scientists, we all sense today that a very profound change has come over the world. With the peril to safety, so much greater than at any previous time in mankind's history, there is of course peril to all our other values. However nostalgic we may be, we all sense, furthermore, that we cannot achieve our own goals by attempting to act in splendid isolation from the effects of the rest of the world on us and from our effects on the rest of the world. It is recognized more and more that there is a "clear planetary indivisibility"[42] of all peoples everywhere, not only as to the minimum value of physical safety, but as to all values—the sharing of power, and the production and sharing of wealth, well-being, enlightenment, health, and respect.

It is this fact of interdependence which is the most striking and urgent fact of the contemporary world. It is a fact which can be documented both territorially, with respect to each value around the globe and, functionally, as between all values.

In terms of power and security the documentation of interdependence is particularly obvious. Few will question, under threats of atomic and biological warfare, that no people can be secure from violence and aggression unless all people everywhere are secure. The very bipolarity of the existing power structure of the world is demonstration of a world community in fact. The governments of the United States and Russia, and of

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[41] *A Statement by the Emergency Committee of Atomic Scientists, April 12, 1948*, 4 BULL. A. S. 176 (1948). The signers are Albert Einstein, Chairman, Harold C. Urey, Vice-Chairman, Harrison Brown, T. R. Hogness, Joseph E. Mayer, Philip M. Morse, H. J. Muller, Frederick Seitz.

[42] SCHERMAN, THE LAST BEST HOPE OF EARTH 15 (1941).

all the other nations, are so obsessed, necessarily obsessed, by expectation of violence that they must calculate every proposed measure of cooperation with respect to wealth, enlightenment, human rights, and so on, in terms of its possible and probable effects on the balance of power, fighting effectiveness, and, hence, on their security.

Conversely, just as the production and sharing of wealth are dependent on security, security is dependent on wealth. Because of the demands of people around the globe, no nation is likely to achieve security unless there is a rising standard of living everywhere. Thus, paradoxically, a nation which because of fears about power consequences refuses to assist in building up the rest of the world, may, because millions of people elsewhere remain poor and envious and susceptible to invitations to violence, remain insecure. The intimate interrelation of considerations of security and considerations of wealth appears, further, in the Russian assumption indicated above, that capitalism is in its death throes and that capitalist countries may in a desperate effort to save themselves attack Russia.

The dependence of the production and sharing of goods and services in any one nation upon high standards of production and sharing in other nations, and upon cooperation between nations, can be stated in terms of a positive correlation. Economists have agreed for centuries that the greater the resources that can be drawn upon and the greater the division and specialization of labor, the greater the production of values. Nor is it seriously questioned that this result holds irrespective of whether exchange between areas is effected by individuals or by groups, governmental or otherwise.

The inevitable effects of security considerations upon such values as enlightenment and respect, and upon human rights generally, need no special emphasis in a world haunted by garrison states, in fact and in spectre. The dependence of all values upon enlightenment, and upon the methodically conscious use of foresight that is sometimes called planning, is equally obvious. One might make further reference to the dependence of security and wealth upon a wise use of respect, to the dependence of peace on character, and to the dependence of character on enlightenment and child-rearing. With respect to health, it is daily being proved that bacteria, viruses, and pathogenic protozoa know no geographical boundaries. J. B. S. Haldane has said, "Every Rumanian infected with infantile paralysis, every Indian with small pox, every rat with plague, diminishes the probable length of my life."[43]

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[43]Quoted in Hiscock, *New Frontiers in Health Education,* 37 CAN. J. PUB. HEALTH 452 (1946).

The conclusion to which a more systematic and detailed analysis of all these interdependences would point is clear: the dependence of man upon man has become inescapably world-wide.

VII. The Conditions of a Democratic World Order under Law

We come now to the critical issue. The formal answer, however, is clear: the conditions of a democratic world order under law must include both a distribution of values and a creation of institutions which will take adequate account of the interdependences described above. In terms of values the most important factor is, of course, power, and a democratic world order under law will require both a very high degree of concentration and a very wide dispersal of both formal and real power. A high degree of concentration of power will be required to bring world-wide community coercion to bear to maintain security, freedom from violence and aggression, and to provide a framework of policy and regulation which will permit the peoples of the world to pursue all their other values by peaceful procedures and with the greatest efficiency that resources and technical skills allow. A very wide dispersal of power, including a very wide sharing in control over the concentrated world security organization, will be required both to insure that values are pursued by procedures compatible with democracy and to secure the initiative and responsibility necessary to fullest production.

It is remarkable to what degree all observers—from philosophers to atomic scientists and political scientists, and even including bridge players and lawyers—who consider our long-term objectives and what conditions require today come to a single conclusion. Sometimes this conclusion is phrased in terms of the imperative necessity for a world "state;" at other times, in terms of such necessity for a "world police force." When details of implementation are considered, the differences are largely semantic. Typical recent statements follow.

Professor Morgenthau:

> Our analysis of the problem of domestic peace has shown that the arguments of the advocates of the world state is unanswerable: There can be no permanent international peace without a state coextensive with the confines of the political world. The question which calls now for our attention concerns the way in which a world state can be created.[44]

Professor Rabinowitch:

> In the light of the present and impending developments in military technology, there is only one realistic blueprint for se-

[44] Morgenthau, Politics among the Nations 398 (1948).

> curity for any one nation: the subordination of *all* nations to international law and order, and elimination of their right and actual ability to wage war. The establishment of such a community of law-abiding (and not merely "peace-loving") nations is the only intelligent long-range aim of foreign policy. This beacon should guide our day-to-day political decisions; we should not permit its light to be obscured by storms of national passions and fogs of ideological confusion.[45]

An appropriate distribution of power is not, however, the only condition of a democratic order under law. Comprehensive specification would include such other items as, in terms of values, a certain balance of income and wealth, a lack of discrimination for reasons irrelevant to capacity under respect, the flow of realistic information under enlightenment, less destructive personality formation under character, a growing standard of common right under rectitude, and, in terms of institutions, the kind of constitutional charter, modes of representation, allocation of functions, structures of administration, and procedures required for the democratic and effective performance of legislative, executive, and judicial functions. As difficult as this comprehensive specification may prove, there is reason to hope that, when the nation-states of the world come to a genuine willingness to cooperate on security problems, our long experience with democratic constitutions and public administration in areas less than the world and the contemporary developments in social and physical science will bring the necessary technical recommendations within our competence. Details will of course depend upon the context of the time and the compromises necessary to secure action.

It is with respect to short-run objectives and immediate steps, designed to bring states to a more genuine willingness to cooperate on security problems, that debate rages most fiercely. In this connection I should like, with deference, to refer to a statement made last spring by General Marshall, as Secretary of State, and to suggest that it prescribes an approach considerably short of what may prove most practicable. Opposing efforts of proponents of a general revision of the United Nations charter, General Marshall spoke as follows:

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[45]Rabinowitch, *The Narrow Way Out,* 4 BULL. A.S. 185 (1948). Comparable expressions abound in the literature. See, generally, *Hearings before the House Committee on Foreign Affairs,* 80th Cong. 2d Sess. (1948), *Structure of the United Nations and the Relations of the United States to the United Nations;* SCHUMANN, INTERNATIONAL POLITICS (4th ed. 1948); Wright, *The Study of War,* 2 WORLD POLITICS 243 (1949); BALDWIN, THE PRICE OF POWER 316 (1947); COUSINS, MODERN MAN IS OBSOLETE (1945); Friedwald, *The Atomic Deadlock Could be Broken,* 4 BULL. A. S. 363 (1948); Usborne, *The Crusade for World Government,* 3 BULL. A.S. 359 (1947).

> A number of projects designed to improve international conditions by new forms of international organization have been proposed. These projects envisage radical changes in the existing United Nations Charter.[46]

He then outlines some of the projects and conditions, and continues:

> All of these projects appear to rest on the assumption that the present unsatisfactory state of world affairs is a result of inability on the part of the United Nations to prevent aggression; that this inability arises from the exercise of the veto power in the Security Council and the lack of a United Nations police force; that if the veto power on enforcement decisions could be removed and the United Nations provided with armed forces, aggression could be prevented; and that the principal barrier to world peace would thereby cease to exist.
>
> The general assumption rests I think on an incomplete analysis of our main problems of foreign policy at this juncture and of the part which international organization can play in solving them.
>
> The underlying problem in the immediate future is to bring about the restoration of economic, social, and political health in the world and to give to the peoples of the world a sense of security which is essential for them to carry on the task of recovery. What is needed for the achievement of a world order based on law and dedicated to peace and progress is a widespread improvement in the material and social well-being of the peoples of the world.

The General continues at some length in comparable terms.

No one would question that the improvements proposed by General Marshall are needed for a democratic world order under law. But because of the expectations of violence which have been emphasized above, because of the dependence on security of all these other values which General Marshall rightly stresses, and because people will not, and cannot be expected to, cooperate with respect to wealth and other values in any real measure without calculating the effects of their cooperation on the balance of power and security, I submit that we can expect no very real achievement on the other values unless something is done, until effective action is taken, on the security problem. The negotiation of the Atlantic Pact is recent recognition of the primacy of security and the real question

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[46]Hearings, *supra* note 45, at 39; printed also in 18 DEP'T STATE BULL. 463 (1948). The statement was made on May 5, 1948, to the House Foreign Affairs Committee.

is whether we should not continue to explore and propose security alternatives that admit of world-wide compass.

I might put the point another way: You will recall the writers who insisted that order comes before law and not law before order. I should like to suggest that the process is actually one of continuous interaction of interdependent variables, that order affects law (power processes in which formal authority is conjoined with effective control) and law affects order (peaceful procedures in the pursuit of all values), that power affects production and the sharing of wealth and that the production and sharing of wealth affects power, and so on. Rational policy requires us to explore and propose all hopeful alternatives, to catch hold of any handle, to obtain control of any factor we can to affect this continuous process, and not to assume that any one alternative is the only answer or any one factor the only significant variable. In terms of priority of action, of immediate tactics, there is good reason, however, to believe that nothing very consequential can be done about other values except in a context of alternatives which promise that the power-security problems will be resolved in considerable measure.

It is necessary, finally, to dispose of a small group of dissenters who appear to suggest that, even assuming a genuine willingness on the part of the nation-states of the world, it is technically impossible to create effective centralized control to maintain security. This group minimizes the potentialities of any effort to improve the United Nations, such as by changing the veto provisions, and in general tends to scorn proposals for strengthening the structure of formal authority on the world level—thereby giving comfort to isolationist, suicidal sentiments. Most members of this group cite for support an article by Professor Jacob Viner, written early in 1946 before perhaps the full implications of the new technology were clearly apparent. The most often quoted passage from Professor Viner reads:

> The United States and Soviet Russia are each too strong, relative to the total power potential of the world, to be proper members of a world government, even if their governments and their peoples were genuinely willing to enter such a government. In a narrow legal sense sovereignty can easily be formally surrendered, but actual power is more difficult to surrender and can be effectively surrendered only to an agency still more powerful. In the present state of the world such an agency with superior power not only does not exist but cannot be manufactured out of existing ingredients, even if the genuine will to do so existed, *unless that will goes to the extent of preparedness on the part of the United States and of Soviet Russia to dismember themselves.* Splitting the United States and splitting Soviet Russia seem to

> present a more difficult problem than splitting the atom proved to be. Setting up a facade of world government where the power-basis for its successful functioning was not present would be worse than useless. No government would be fooled thereby into a false sense of security, but every government would be impelled to pretend that it was, and all diplomacy would be carried out in an atmosphere of superficially-concealed insincerity.[47]

If what Professor Viner is saying (a construction which requires some distortion of his words) is that, despite any *apparent* agreement, it will be difficult to get the *genuine* agreement of the élites and peoples of the world, to provide them with incentives in fact and to expand and intensify their loyalties, for an effective security organization, one can only agree, still insisting that we set promptly and resolutely to the task. If, on the other hand, what he is saying is that given consent it is technically impossible to fashion a disarmament program for nation-states and to establish a world police force capable of maintaining a reasonable security, the question becomes one for the appropriate technical experts and most of these appear to disagree with Professor Viner. A typical summary of many expressions can be taken from President A. H. Compton:

> Now for the first time also it becomes feasible for a central authority to enforce peace throughout the world. Before the second World War, many parts of the earth were difficult of access by a world police. Today this is changed. Fast airplanes, long-range rockets, and atomic bombs have now solved the technical problem of bringing to bear on any area at any time, whatever destructive force may be required to quell resistance. A central authority having virtual monopoly of these major means of warfare can now be equipped to enforce international peace.[48]

VIII. Rational Alternatives in a Bi-Polar Power Structure

It needs no great prophetic insight, however, to anticipate that no genuine willingness of nation-states to create an effective, world-wide security organization can be expected in the calculable future. We come finally, therefore, to rational alternatives in a bi-polar world. For us as Americans, rational alternatives seem to me to require a three-fold program:

First, we can continue, as we are doing, to attempt to contain Russia and the Communist Party by peaceful means.

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[47]Viner, *The Implications of the Atomic Bomb for International Relations*, 90 Proc. Am. Philosophical Society 56 (1946).

[48]Quoted in Blackett, Fear, War, and the Bomb 91 (1948).

Second, we can undertake the tighter and tighter organization of the free part of the world not only by such limited purpose devices as the Atlantic and comparable pacts, but also by preparing and proposing a model for more comprehensive organization on a regional basis, always leaving open the possibility for admission, at a more propitious future time, of new regions from behind the iron curtain.

Third, we can continue to take the initiative in clarifying for ourselves and others the kind of world community in which we as democrats would like to live and the kind of world community organization, in utmost detail, which can guarantee security and democratic values for all people. The assumption and exercise of moral leadership in the name of all peoples can only add to our national strength, which may be indispensable to force certain necessary compromises.

To return for a moment to the role of doctrine, it is important to recognize that some of the traditional doctrines and practices of international law may contribute to our purposes. For this reason the agitation in the United Nations for the codification of international law can be encouraged, in the hope that it may result in a real clarification of policies . It is important also to recognize that during a period of transition, while the globe is broken up into Russian centered and American centered orbits, much of our effective international doctrine and practice will be in fact adjusted to the needs of those who share our objectives and are willing to work with us toward their realization. Hence, while we have in mind the globe as a whole, we may have to recognize that the principal function of our clarified doctrines and practices will be to smooth relationships among states in our part of the world community. The fact that doctrine which is phrased in the name of all nations of the world does effectively apply to some of them only is no novelty. The history of the development of international law and practice is not the history of a concerted effort among equals throughout the globe. It is on the contrary a history of conceptions which clarified the values for the most part of people who in modern times have shared the values of Western European civilization. The problem of this time is to reconsider the adequacy of traditional doctrines and practices for the task of bringing into effective working relationship all the peoples with whom we can cooperate.

The task of building an effective democratic world community organization with appropriate doctrine and procedures, to include first the Western-centered orbit and eventually the Russian, poses, it must be admitted, problems of the greatest difficulty for professional specialists and will require the firmest public support. It is this objective, however,—the objective of an organization that can guarantee reasonable security and free us for the peaceful pursuit of all other values—that we should hold

constantly before us, whatever the temporary compromises that conditions may require. As indispensable as a balancing of power policy is under contemporary conditions, in the end, if it is not replaced by an effective world police force, the high probability is—all history shows—that it will lead to war.[49] The demand upon us, the opportunity for us, is to exercise for the new conditions of our time the same acumen and creativeness which led, in the sixteenth and seventeenth centuries, to formulation of the basic principles and practices of the modern era. This demand has been most eloquently phrased by Professor Einstein. In a recent statement he says:

> Our situation is not comparable to anything in the past. It is impossible, therefore, to apply methods and measures which at an earlier age might have been sufficient. We must revolutionize our thinking, revolutionize our actions, and must have the courage to revolutionize relations among the nations of the world. Cliches of yesterday will no longer do today, and will, no doubt, be hopelessly out of date tomorrow. To bring this home to men all over the world is the most important and most fateful social function intellectuals have ever had to shoulder.
>
> A tremendous effort is indispensable. If it fails now, the supra-national organization will be built later, but then it will have to be built upon the ruins of a large part of the now existing world. Let us hope that the abolition of the existing international anarchy will not need to be bought by a self-inflicted world catastrophe the dimension of which none of us can possibly imagine.
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> The time is terribly short. We must act now if we are to act at all.[50]

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[49]Helen Mears, in MIRROR FOR AMERICANS: JAPAN 317 (1948), graphically depicts the difficulties of a balancing of power policy: "Nothing could be more clearly designed to highlight the failure of the system of balance-of-power politics than the relations of Britain and the United States to both Japan and Russia during Japan's modern period. Looking at the record, and stating it in its simplest, most obvious terms, the British "security" system looks like nothing so much as a bowling alley in which nations are set up like tenpins only to be knocked down again. First Japan was set up to knock down Russia. Then Japan proved "unreliable" and we set up Russia (Remember Yalta!) to help knock down Japan. Now it appears that Russia is already even more "unreliable" than Japan, so we are trying to get China set up, by establishing a strong centralized regime, under the "progressive" Chiang Kai-Shek, to help knock Russia down again. We are also, of course, attempting to "stabilize" Korea for the same purpose. The Japanese islands are thought of as a base for such proceedings. If this nonsense isn't stopped—and if war doesn't come in the meantime—twenty years or so from now we'll be building up Japan or Russia again, to knock down China."

[50]4 BULL. A.S. 295, 299 (1948).

WE BE OF ONE BLOOD, YOU AND I, OF ONE LAW, ONE FAITH, ONE BAPTISM*

Joseph C. Hutcheson, Jr.†

Dean Farley, Judge Cox, Distinguished Guests, including therein all the fatheaded nitwits, the chuckleheaded dimwits, and the deadheaded nimblewits who have managed to wheedle and wangle their way to the head table, Ladies, Gentlemen, Roughnecks, and Rabble, lend me your ears.

I have come a long way and a devious way, via New York, Washington, and points east and west, to talk, and talk I will until my piece is spoken, come hell or high water, cock crow or dawning.

Before, however, calling the main bout, let me put in a few licks by way of preliminaries.

First, let me say to the members of the bar, representing here the rougher element in our profession, who have come to watch their boy trade punches with the goofy talkers, the elegantia, and the intelligentsia of law review and school, how grateful I am that you have come. For though by dint of a little learning in, and practice of bewordling, by fast foot and mouth work, and by staying power in the clinches, I have managed to muscle my way a little into this racket, I am not at home here.

Essentially a rough neck trial lawyer, I am one of those of whom it may be truly said, "He never lacked for a word, but if he paused for an idea, he paused in vain." It heartens me no little, then, when I enter a competition of this kind, to know that my gang is here in force with a full complement of muscle-bound lame brains and addle-pated numskulls no more certain than I am when or whether I am talking sense or nonesense, but with me all the way.

It is true that by much cracking and thumbing of books and a certain facility in using, and in part understanding, the gobbledy gook of our trade, I early acquired with certain sons of Belial in the profession, lewd fellows of the baser sort, as the Scriptures call them, the name of being learned in the mysteries of the law.

This was particularly true of a big, husky, handsome character who had come to Houston from Northern Mississippi, equipped with a physique

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*Address delivered at the annual dinner of the Southern Law Review Conference, at the University of Mississippi, March 26, 1949. Dean R. J. Farley, the toastmaster, made some humorous remarks about judges in general and in particular, after which he introduced the Honorable Allen Cox, U. S. District Judge of the Northern District of Mississippi, who in turn introduced Judge Hutcheson.

†Univ. of Va.; LL.B., Univ. of Texas; U. S. District Judge, Southern District of Texas, 1918-1931; U. S. Circuit Judge, Fifth Circuit, 1931---; Chief Judge, U. S. Court of Appeals, Fifth Circuit, 1949---.

and a voice like the Bull of Bashan, and with as much courage and as little sense. Somehow and somewhere he had managed to obtain a license to practice law which sufficed to get him into, but not to keep him in, court. If he got a lawsuit, which he did quite often, he needed help and needed it badly. My ability to read and to a point understand law books had, notwithstanding my small size and small voice, impressed him greatly. Whenever he had what he thought was a good lawsuit, he would come to me and say, "Joe, I have got a wonderful lawsuit, and I need your help. You know, Joe, I am hell with the jury (and he was), but the law is a lion in my path."

I never knew how or where he got admitted, but if he was not the original, he was certainly a carbon copy of the lawyer of whom, when asked why in the world he had qualified him to practice, the judge indignantly replied, "I didn't do it. I admitted him, all hell couldn't qualify him."

Second, let me thank the Southern Law Review Conference, Dean Farley, Mr. Ethridge, and Mr. Winter for inviting me here, and those two stalwart law review men of Ole Miss, my fidus Achates, Morton, and his helper, Darden, my two faithful slaves of the lamp, for chauffeuring and escorting me, shepherding and succoring me while here. I think, though, lest I be thought a sucker for flattery, I should say that I realize that it was not my personal charm which got for me the care and nurture I have had while here. It was the fact that, like the "little darkey" in the tale, I had the "can of bait," the speech which they had touted as the piece de resistance of the meeting, and they were determined that I should not disappear or otherwise fall out until the speech had been delivered.

Third, I should like to toast Ole Miss on her centenary. For those of you who love her, age cannot wither nor custom stale her infinite variety. Like another charmer, she does not cloy the appetite, she feeds but makes hungry most where she satisfies most. To her sons and daughters she will always be dear.

Virginia and Texas are my loves, but I love Ole Miss, too. And why not? Am I not a Southerner and a Texan? Has not Mississippi sent thousands of her sons and daughters to great Texas to contribute to her greatness? To name only two, Thomas Watt Gregory, President Wilson's great wartime attorney-general, and Joseph Weldon Bailey, one of Texas' elder statesmen.

Fourth, when so many darkeners of counsel, with political axes to grind, so many pressure groups, with factional ends to serve, are misrepresenting the motives and actions of Southerners, and too many are defaming the South, I should like to say a word to you in criticism and in praise of

our institutions, our aspirations and our goals, our universities and our people—in criticism where we fall short, and in praise where we measure up.

Let my word, though, be not one of anger or resentment against our attackers but an appeal for a better appreciation, a broader tolerance from and toward us.

Have we not in these United States one law, the law of the Constitution; one faith, faith in our way of life and in our destiny; one baptism of fire? Ought we not then, instead of accusing and attacking each other, struggle for a greater sympathy with, and a clearer understanding of, each other; a greater joint effort to exorcise the four devils of bigotry and intolerance, of prejudice and of passion. For that kind cometh not out save by fasting and by prayer.

Let us, then, never forget that the tongue is a little member which boasteth great things; that a soft answer turneth away wrath, but grievous words stir up anger; that all we, like sheep, have gone astray; that there is no man without sin among us—no, not one.

Finally, let us struggle without ceasing to find common ground to stand on as Americans all, sons and daughters of a common heritage, the heritage of liberty under law, in our never ending search for the justice of the General Will, that justice which renders to each individual his due without regard to whether a particular "each" is, or is not, a member of a labor union or of any other economic, racial, social, or political group or faction.

And now to my speech. When Mr. Ethridge, writing me that you were meeting here, asked me to speak, I was glad to accept. For I believe in the law review as an institution, particularly in its emphasis upon student management, student participation, student training. I have contributed, to some purpose I think, to the pages of law reviews, south and north. Last but not least, I was one of the three Americans present, on July 10, 1935, at the dinner in Lincoln's Inn Hall in celebration of the fiftieth anniversary, the jubilee year of the *Law Quarterly Review,* the daddy of all law reviews.

There in that memory charged hall, that shrine, that holy of holies for lawyers, did Lord Tomlin of Ash, in lovely limpid English, shot through with humor and delivered with a charming British accent, toast Sir Frederick Pollock, the first editor of the *Review.*

There did Arthur Goodhart, the present editor of the *Review,* in equally charming English with an American accent, toast "The Contribu-

tors." There Mr. Justice Eve, in good English and good form, did toast "The Teachers of Law."

There, too, I heard Sir Frederick Pollock, then ninety-four years of age, little, lively, and quick of mind and manner, make his gracious response, and Lord MacMillan and Sir William Holden, in more stately manner, make their responses to the other toasts.

There, by baptism and the laying on of hands, was I, as one born out of due time, received into the Law Review confraternity of student, teacher, lawyer, and judge, and there was I sent forth to preach the true gospel of the Law Review, not as the Scribes and Pharisees, but as one having authority.

But over and above all this, like you, I am, and long have been, a knight of our Lady of the Common Law, whose chroniclers and commentators you law reviewers are. I thought to myself, then, "Well, here's an opportunity to review with my little brothers of class and school, not as critic and criticized, but as co-worshipers, the past glories and the present parlous state of our Lady."

When first, now fifty years ago, as a law student, I worshiped at her shrine with the ardour and longing of the neophyte, I was another Don Quixote, ready to do battle with any who questioned her exquisite symmetry, her elegance, her perfected completeness and her charm. Especially was I wont to fly to arms against any who dared to suggest that my Dulcinea could stand a little statutory face lifting, a little statutory padding here, a little statutory reducing there. In short, without then having read Carter's *Law, Its Origin, Growth and Function,* I was in spirit a thorough going Carterian, as firm a believer in common, as confessed an unbeliever in statute law, as he.

As enamored of the common law as Sir Edward Coke at his apogee, I took great pleasure in quoting a dictum which, correctly or incorrectly (I have never checked on it) I ascribed to him: "If you ask me what the common law on any matter is, I should be ashamed not to know the answer. If you ask me what the statute law on it is, I should be ashamed to know it."

It is true that I was compelled in law school to learn, and in practice to know, the statute law of Texas, especially as to real property, family relations, and other like matters where statutes had superseded or greatly supplemented the common law. Always, though, I was struggling to relate and subordinate the statutes to the common law under the canon, which then had full sway, that if a statute is declaratory of the common law, it must be liberally, if derogatory of it, strictly, construed.

If, when I was at Texas, the school had had a law review, I should have been a contributor to its pages, using them to extol the virtues and merits of judge-made, or lawyers' law. Indeed, since I am one of those who believe that the case system, the system of teaching from cases alone, which had no vogue at Texas in my day, was for a long time in some places, and still is in some, made too much a fetich of, too much run into the ground, the only thing that, in looking back on my law school days, I regret is that we had no law review.

I hadn't been long out, however, before I came to see that these pro-common law, anti-statute law, views of mine would not hold water. Still holding to an abiding faith in the common law as a legal system, especially because of its reliance upon principles and policies, its fundamental belief in natural law and in human destiny, its fundamental assumption that there is a spirit in man, and that, under natural law principles, laws were made by and for man, not man by and for laws, I came to see in a new light the relation of decisional and legislative law.

I came to see that to a living law, a law which growing lives and living grows, it is essential that there be always going on a continuous and orderly process of change through adaptation and conformity to the life it serves. I thus came to see that the two chosen instruments of this change, this adaptation, this conformity, are creative legislation and creative decision, and that since decision cannot be as creatively free, legislation is necessary not only to coordinate and clarify the common law as it is, but sometimes to create new points of departure in the march of the law toward what it ought to be.

Though I arrived at these views quite early, and consistently thereafter adhered to them, I did not specifically formulate them until in 1928, when in an opinion in *Brotherhood of Railway and Steamship Clerks v. Texas and New Orleans Railway Company,*[1] I first set my new credo down.

In 1929, in my first law review article, "The Judgment Intuitive, the Function of the Hunch in Judicial Decision" in the *Cornell Law Quarterly,*[2] I made public confession of my conversion from my early worship of the law as a thing full grown to a belief in a changing law with all its "glorious uncertainty."

Because in that opinion and in that article and a later one, "The Worm Turns, or a Judge Tries Teaching" in the *Illinois Law Review,*[3] I have fully put my case, I will not trouble you with stating it here. I will

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[1] 24 F.2d 426 (S.D. Tex. 1928).
[2] 14 CORN. L.Q. 274 (1929).
[3] 27 ILL. L. REV. 355 (1932).

say only as to "The Worm Turns," that it was written after a session at teaching at Northwestern University, in the course of which, having taken the professor's shilling and put his coat on, I had become the professor's man. As a result I had undergone a strange metempsychosis, the soul of the judge had moved out, the soul of the professor had moved in for a time, and what I said there must be read in the light of the fact that the last state of that man was worse than the first.

Since then I have written many opinions, over one thousand to be exact, many articles in law reviews, less than one thousand to be exact, have delivered at the University of Virginia the White Lectures which were done into a book, *Law as Liberator,* and have made a good many addresses on legal topics.

In them all I have taken and acted upon the same position, that while case law must change and grow with the times through judicial decision and legislation, this growth will not be just or sound unless it is in accord with the principle of democracy in America, the spirit of its laws. This principle, this spirit, is that law is the liberator, never the enslaver of mankind, that men are bound to obey laws only if they are in conformity with the justice of the General Will. Thus a law which gives effect to the partial will, the will merely of a minority or a majority which has seized the power, can never be true or just law with us.

That alone is just law here which keeps faith with the natural law principles on which our freedom depends, faith with the rights of man, faith with the constitution which declares, and with the constitutional way of life which protects, them, faith with law as liberator, faith with the justice of the General Will, faith with the American way of life, faith, in short, with the principles and practices which in Madison's immortal phrase, "enable the government to control the governed, yet also oblige it to control itself."

If you ask me, "What have law reviews to do with all this?", I will answer you, "A great deal." I freely concede, as all thoughtful observers must, that the prime function of the law review is as a teaching aid, its greatest value is that, through the clinical instruction it affords, law students better learn to be better lawyers. I must, though, insist that its value to the field forces of the law, lawyers, judges and legislators is also great.

This value lies in the ever fuller development of the critical faculty, the critical approach to law. It lies, too, in furthering juristic thinking and writing along broader and more philosophical lines than, in Burke's phrase, "the inferior, the unlearned, mechanical, mere instrumental members of the profession of the law" are commonly immersed in when, their attention centered in and confined to the meticulous search for cases in point, they look and long, and long and look, for a white horse case.

I do not mean by this, though, to say, or even to suggest, that such broader writing and thinking is or can be of more value to the growth of the law than the thinking and writing of lawyers and judges in actual cases or even of as much value. I am of quite the contrary opinion. Goethe, whose bi-centennial we celebrate this year spoke for me when he said: "A thorough advocate in a just cause, a penetrating mathematician facing the starry heavens, alike bear the semblance of divinity."

I have no patience with the notion put forward by some law school men and many New Dealers that there is something wrong about the fact that laws are made in the clash and struggle of litigation where advocates strive for the mastery, that decisions would be better law if rendered without benefit of such advocacy.

I feel strongly, and have many times said, that it is this factor of advocacy which underlies that making of our jurisprudence, and only this, which makes it safe and right for judges not only to state, but sometimes to create, what some call judge-made, others, lawyers' law.

The fact that in our system clients have lawyers, and that the driving impulse to serve them well makes the lawyer not only burrow industriously for precedents, but belabor and cudgel the brains of the listening judge to bring him into agreement, with the further fact that judges are in a way advocates for the right, the just solution is, in the last analysis, what insures that law here will continue to be Liberator, that our government will continue to be, as it was in the beginning, a government of laws and not of men.

Good law, that is, the just law that men like us may live by, after all is not made in the classrooms, in juristic writings, or in the secret conferences of those who would seize the power. It is made in the forums of legal controversy where the rights of men are at issue and, advocate against advocate, the struggle for laws as means is going on. It is forged in the fires of strongly contested litigation and of carefully considered and fully debated legislation.

Nevertheless, I am in no doubt that law reviews and law writings in general have their real place in the making of law, not only by holding the mirror of principle up to particular decisions in their critical studies and analyses of, and their objective and critical judgments upon decisions, but also by holding the mirror of principle up to particular statutes in critical studies and analyses of legislation enacted and proposed.

In 1937, the fiftieth anniversary of its founding, there appeared in Volume 50 of the *Harvard Law Review*[4] and in Volume 23 of the *Virginia*

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[4] 50 HARV. L. REV. 868 (1937).

Law Review[5] at pages 1 through 52, articles on the organization, growth and function of law reviews, their past, present, and future.

One of these, by Rodell,[6] a sort of good-bye to law reviews, seemed to me entirely out of focus and off the beam, but it is well worth reading as an example of what yielding to a mood will do. Written in the modern Cassandra, "Everybody's out of step but Fred" vein, the author is certainly without Cassandra's prophetic insight as to their flourishing future, as the February, 1949 *Index to Legal Periodicals* will show.

There are other articles in the group well worth reading, but for different reasons. The chief of them all is one by John Jay McKelvey, the first editor of the *Harvard Law Review,* "The Law School Review, 1887-1937."[7] In it the thoughtful reader will find not only a faithful history of the law review movement, but an inspired and inspiring statement of its philosophy, its achievement, its promise. I cannot commend it too highly. It should be made required reading for every law review candidate, contributor and editor.

In another article of interest, there appears a set of brief but worthwhile answers collected from editors of law reviews as to their purposes and values.

Still another suggests that law reviews, while not abandoning their study and analysis of decisional law, should take more account of legislative law, and it is to that point that I come in closing.

Sir Frederick Pollock, in his charming little reply to the toast to him as founder, made a particular point of the fact that when students and contributors to law reviews began their audacious, their temerarious, course of picking to pieces, with a vigor and persistence which would not be denied, judicial decisions and their deciders, there were some who waited breathlessly for the heavens to fall. When nothing happened and doctor and student found that they could pull the judicial lion's tail without evoking even a roar, so that what had begun as daring and dangerous hunting of big game turned out to be mere potshotting of rabbits and mice, the boldest spirits lost interest.

Perhaps the real ground of Rodell's caviling was that a law review man could no longer get a thrill out of putting the bite on a judge, and since few, if any, judges bit back, judge baiting and biting, as a worthwhile occupation, was gone.

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[5]23 Va. L. Rev. 1-52 (1936).
[6]Rodell, *Goodbye to Law Reviews,* 23 Va. L. Rev. 38 (1936).
[7]50 Harv. L. Rev. 868 (1937).

If now you ask me, what have you, who are so free to criticize what others have been saying, to say for yourself about the future of law reviews, I am ready with my answer, both generally and in particular.

In general, I would say that they should continue to develop and improve along their present lines.

In particular, I would say:

First, they should continue their same careful, thoughtful, critical examination of, and comments on, decisions and decisional trends.

Second, they should continue to carry leading articles dealing with case law and related problems.

Third, they should continue to maintain and strengthen all of their present departments.

Fourth, and this is where I come in, they should, maintaining their same objectivity, their same dignity, their same freedom from partisanship, turn their citical attention more often to, and discuss more fully, legislation and legislative trends.

Statutes proposed and enacted should be no more sacred from criticism and attack in law reviews than decisions are. Indeed, they should be less so. For decisions are choices made by judges having no partisan interest to serve, no party ax to grind, under received standards and principles which have stood the test of time. Statutes, especially in these latter days of statute making, are too often drawn and pressed by powerful political groups with the aid of grateful or fearful politicians in high places, not to give effect to the General Will, the interest of the people as a whole, but the partial will, the interest of groups or factions.

These and their political allies support their demands by bogus claims of mandates and by alternately promising support and threatening reprisals at the polls. Taking their cue from Europe's one party line, they demand passage of their laws as "must" measures, admitting of no deliberation or debate upon whether they are just laws in the interest of the whole people or unjust laws in the interest of the group or faction which has seized the power.

In examining and criticizing proposed or enacted laws, the same standards and methods should be used, the same questions should be asked as are asked of decisions: Are they in accordance with the principle of democracy in America, the spirit of its laws? Are they just to all the people, or do they discriminate in favor of a particular class or group. Do they represent the General Will of the people as a whole, or do they merely give

expression to the partial will of the minority or majority which has seized power?

I do not know whether the *Federalist Papers* are required reading in law schools. They ought to be, for in them the people then found, and the people now can find, what, if the Constitution is read alone, might escape them. Reading these papers they will find that the founders believed firmly in, and by their Constitution established, this government on natural law foundations. They will find, too, that in doing this they adopted and gave substance and content to Rousseau's mystic principle of the General Will, that principle which declares that an act or decision which represents the General Will, that is, in the general interest of all as opposed to the special interest of a group or faction, is always just, but that the vote of the mere majority, unless "all the qualities of the General Will still reside in it," will be unjust and in the end destructive of liberty.[8]

Madison, in *The Federalist,* makes crystal clear the dangers of, and the remedy against, mere majority control. Saying, "The perfection of government lies upon such a libration in the frame of it that no man or men in or under it can have the interest, or, having the interest, can have the power to disturb it with sedition," he went on to say: "In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secure against the violence of the stronger."

Saying, "In framing a government which is to be administered by men, over men, the great difficulty lies in this; you must first enable the government to control the governed; and in the next place, oblige it to control itself," he went on to say: "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."[9]

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[8]"The body politic, therefore, is also a moral being possessed of a will; and this general will, which tends always to the preservation and welfare of the whole and of every part, and is the source of the laws, constitutes for all the members of the State, in their relations to one another and to it, the rule of what is just or unjust".

"Nor is it less possible for the Council of a Democracy to pass unjust decrees and condemn the innocent. But this never happens unless the people is seduced by private interests, which the credit or eloquence of some clever persons substitutes for those of the state; in which case, the general will will be one thing, and the result of public deliberation another."

"Carefully determine what happens in every public deliberation and it will be seen that the general will is always for the common good; but very often there is a secret division, a tacit confederacy which, for particular ends, causes the natural disposition of the assembly to be set at naught. In such a case the body of society is really divided into other bodies, the members of which acquire a general will which is good and just with respect to these bodies, but unjust and bad with regard to the whole, from which each is thus dismembered".

[9]"If the unjust faction is in the minority", says Madison, "in a republican government the majority can easily control. But when the majority is included in a faction

Ben Palmer, in his remarkable series of articles in the *American Bar Journal,* completed in the March issue, has pointed out the difficulties in the way of just judicial decision arising from the lack in judges of a common faith in the greatness of human destiny and the rights of man, the influence of a growing faith in economic determinism and sheer materialism, with its emphasis upon statism and its negation of natural law, a growing unfaith, in short, in the fundamental principles upon which this government was founded.

Others have pointed to the threat to our way of life, our form of government, arising from the growing loss of faith in these principles among some of our people, including our legislators.

I am one of those who believe that our difficulties arise not from any deliberate turning away on the part of our judges and legislators from the faith of our fathers, but from the confusion and misunderstanding caused by our efforts to follow St. Paul's injunction to prove all things, holding fast that which is good.

Speaking more precisely, I think some of our judges, as well as some of our legislators and executives, are confused by their efforts to reconcile the General Will principle, upon which the government was founded, with the loud and clamorous voices of massed minorities with great voting power and of majorities asking as of right, that is, because they are in power, that partial and unjust laws be passed in their interest.

Some in all the branches of our government seem never to have known, or to have forgotten, that, under its principles majorities are fiduciaries of power, and, as fiduciaries, are obliged to speak with the voice of the General Will and not that of factional or group interests.

Madison long ago saw and pointed out to us the danger to our way of

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the form of popular government enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed."

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"Wherever the real power in a government lies, there is the danger of oppression. In our Governments, the real power lies in the majority in the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of the government contrary to the sense of its constituents, but from the acts in which the Government is the mere instrument of the major number of the constituents. Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested party than by a powerful and interested prince." Letter from Madison to Jefferson, 1788. 5 DOCUMENTARY HISTORY OF THE CONSTITUTION 88.

[10]"Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint. Has it been found that bodies of men act with more rectitude or greater disinterestedness than

life from the growth among us of strong political groups or factions with interests to serve which are contrary to the interests of us all.[10]

I believe that if we can in some way make provision for a searching, a critical, a non-partisan examination of our statute laws, state and federal—those enacted as well as those proposed—with the end and aim of determining which of them, in the interest of the whole people, speak with the voice of the General Will, and which, in the interest of a group or faction, speak with the voice of the partial will, we shall be on our way toward preventing, or at least minimizing, what we suffer from now, group or factional control.

So believing, I call upon each of you, as representatives of your law reviews, to use your influence to institute and further a department on legislation, organized and conducted to this end. If only one of you will do so, I shall feel that I did not come here in vain.

And now, while the night is yet young and your flatteringly unflagging attention still tells me that I have not talked you down, let me congratulate you upon the enthusiasm and effectiveness of your conference, and, wishing you every happiness and success, say, "Good night and God bless you" to you all.

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individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind; and the inference is founded upon obvious reasons. Regard to reputation has a less active influence when the infamy of a bad action is to be divided among a number, than when it is to fall singly upon one. A spirit of faction, which is apt to mingle its poison in the deliberations of all bodies of men, will often hurry the persons of whom they are composed into improprieties and excesses for which they would blush in a private capacity." THE FEDERALIST 102 (Dunne).

BETTERING OUR FEDERAL GOVERNMENT BY CONSTITUTIONAL AMENDMENT

*Walter P. Armstrong**

No one of the framers was completely satisfied with the Federal Constitution. Each had surrendered some of his views to effect the compromises which were necessary to secure its adoption. Moreover, the advocates of the various plans put them forward as experimental, urging that they should be tried and later altered in accordance with the dictates of experience. Those who in the states supported ratification argued not that the Constitution was perfect but that it was worth trying as the unprecedented framework of an entirely new system of government.

The framers may not have builded better than they knew but certainly they builded more permanently than they thought, especially as to the framework of the government. The Constitution has undergone many changes—chiefly as a result of the Civil War amendments and Supreme Court construction, but none of the court decisions and only three of the twenty-one amendments have fundamentally altered the framework of government which was laid down in Philadelphia in 1787.

One of these amendments (the eleventh) cannot properly be classed as a fundamental change. It prohibits suits against "one of the United States by citizens of another state, or by citizens or subjects of any foreign state." Hamilton had argued in *The Federalist* that such a suit was not maintainable but John Marshall's court held otherwise and the amendment was adopted to nullify this decision, as the Sixteenth Amendment, authorizing the Federal Government to levy taxes on incomes, was adopted—not to change any specific provision of the Constitution but to reverse a construction of the Supreme Court derived from the general language.

The Twelfth, Seventeenth and Twentieth Amendments do touch the framework of the Federal Government. The original Constitution did not require electors to vote for one person for President and another for Vice-President, but provided that all votes should be for President and that the person receiving the highest number of votes (if a majority) should be elected President and the person receiving the next highest number Vice-President. When Thomas Jefferson and Aaron Burr received an equal number of electoral votes for the presidency and the election was thrown into the House of Representatives, a patent defect in the Constitution was

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revealed. This was remedied by the Twelfth Amendment, which provides that electors shall vote separately for President and for Vice-President.

The Twentieth Amendment was adopted to correct what proved to be another defect in the Constitution. The date when (as the result of ratification of the Constitution by nine states) the Federal Government would go into effect could not be foreseen by the members of the Constitutional Convention. That date was fixed by the Continental Congress as the first Wednesday in March, which was in that year (1789) the fourth of the month. Hence the terms of the President, senators and representatives ran from March 4th. The Constitution, however, provided that Congress should meet on the first Monday in December; although an entirely new House of Representatives and one-third of the Senate were thus elected in November of every even year, the terms of the new members did not begin until March 4th of the year following, and if the year was one for a presidential election this was true of the President. However, as Congress was required by constitutional mandate to meet on the first Monday of December after the November election, the Congress that met was the old Congress, in which the newly elected members could not take their seats. The anomoly of this "lame-duck session" was responsible for the Twentieth Amendment.

This amendment fixes the terms of the newly elected members of Congress as beginning January 3rd after the previous November election, and requires Congress to meet on that day. The terms of the President and Vice-President are fixed as beginning on January 20th.

The Twentieth Amendment also provides for certain contingencies with which the original Constitution had not dealt. If the President-elect dies before the beginning of his term the Vice-President-elect becomes President. If a President has not been chosen or fails to qualify, the Vice-President-elect acts until a President shall have qualified. Congress is authorized to provide for a situation where neither a President nor Vice-President qualifies and "for the case of the death of any of the persons from whom the House of Representatives may choose a President, whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice may have devolved upon them."

None of these amendments is demonstrably in conflict with the conception of the founding fathers. It is arguable that those which nullify decisions of the Supreme Court reflect the views of at least a considerable segment of the Constitutional Convention. The others fill lacunae which the framers did not foresee.

This, however, is not true of the Seventeenth Amendment. It was after mature deliberation that the Convention decreed that senators should be elected by the state legislatures. Popular election as provided by the amendment is a drastic departure from one of their fundamental concepts.

Why has there in almost 160 years been only one essentially fundamental change in the structure of the Federal Government? Is it because of political inertia? Or because the original structure was so nearly perfect that no remodeling was needed? To attribute it to the former is to ignore the radical changes that by amendment and court decision have altered the relations of the nation and the states to the advantage of the nation. To explain it by the latter is to be oblivious to the penetrating criticisms of statesmen and political scientists which have repeatedly pointed out the defects—some fraught with potential danger—in our governmental structure. It is to be found rather in the rigidity of a written constitution and in the particularity with which it blueprints the mechanism of the Federal Government. The powers of the Federal Government are defined by what Mr. Justice Frankfurter has called "the neutral language of the Constitution." So neutral is this language that in many ways our constitutional development is as responsive to public opinion as if our Constitution were unwritten—provided only the Supreme Court does not ignore the general will. In the last two and a half centuries there have been more over-all changes in our written Constitution than there have been in the same period of time in the British unwritten constitution. There was with us more room for change, because of the complicated relation of states and nation. On the other side of the Atlantic almost the only room for change was in the mechanism of government. It is in that room that the change has taken place—the complete triumph of cabinet government.

With us such a change is far more difficult. There is no "neutral language" in those provisions of the Constitution which set up the federal machinery. No Supreme Court can override or alter these particularized provisions. Only an aroused people can by amendment improve them. This, experience proves, they will not do except when confronted with "a clear and present danger." Each of the amendments which deals with the structure of the government was separately proposed and adopted and then only after long sufferance of the ills which it was designed to remedy. There has been no attempt at a general overhauling of our federal system. The attempts that have been made to provide for dangers that are potential and not imminently threatening have been timid and uncorrelated. Without going into the justness of their criticisms or the merits of their proposals it must be conceded that many well-informed statesmen and publicists believe that there are serious and potentially dangerous defects in the pattern of our federal structure, which can be eliminated only by constitutional

amendments. So far each critic has been concerned only with one defect and has proposed but a single amendment. There has been no proposal to consider at one time all the defects and arrive at a comprehensive plan of betterment. That seems to me to be clearly the logical approach. Obviously the proposed changes are interrelated and in order properly to be correlated should be considered by one body at one time and as a whole harmoniously interwoven with the original fabric.

Some of these proposed changes are mentioned not for the purpose of either endorsing or opposing them but as indicative of subjects for fruitful discussion.

In view of the development in recent years of presidential leadership in legislation, probably the most pressing need is for some solution of a deadlock between the President and Congress. Senator Fulbright's proposal is for an amendment which would make the terms of the President, of representatives and of senators coincide, and to give to the President and to Congress the power to call a new national election.[1] This seems almost necessarily to involve dropping the proposed amendment limiting the re-eligibility of the President as incompatible with constitutional recognition of the President as legislative leader.[2] In this connection the constitutional

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[1]The Fulbright Resolution. This resolution (S.J. Res. 29, 80th Cong., 1st Sess.) was introduced by Senator J. William Fulbright, of Arkansas, on January 15, 1947. It was referred the same day to the Committee on the Judiciary of the Senate. No further action was taken.

[2]History of the proposed amendment now before the states restricting the re-eligibility of the President:

A. On January 3, 1947, Earl C. Michener, of Michigan, introduced H.J. Res. 27. It was referred to the House Committee on the Judiciary.
B. Reported with amendment on February 5, 1947.
C. Made special order, February 6, 1947.
D. Debated and passed by House, February 6, 1947. Vote: yeas, 285; nays, 121; not voting, 26.
E. Joint Resolution referred in the Senate to the Committee on the Judiciary, February 7, 1947.
F. Reported with amendments on February 21, 1947.
G. Debated on March 3, 5, 7, 10 and 12, 1947.
H. Passed Senate, March 12. 1947. Vote: yeas, 59; nays, 23; not voting, 13.
I. Senate, on March 12, 1947, insisted on its amendments, requested a conference, and appointed conferees.
J. House concurred in Senate amendments, March 21, 1947. Vote: yeas, 81; nays, 29. (A two-thirds vote was thus obtained; curiously enough, the vote was permitted to stand even though a quorum of representatives was absent. Some doubts have arisen as to the validity, in view of constitutional requirements, of the vote.)
K. Enrolled joint resolution signed by the presiding officers of the House and Senate, March 24, 1947. In its final form the amendment provided, essentially, that:

> No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office

provision authorizing the House to impeach and the Senate to try and to remove the President might well be eliminated. The power to impeach and try are potential weapons against the President in the hands of Congress. In the Chase and Johnson impeachments it was agreed that the President must be found guilty of a high crime or misdemeanor. It does not follow, however, that these precedents will be determinative. Moreover, if Senator Fulbright's proposal is adopted Congress can have the President tried by the people.[3]

Also to be considered would be the plan of Senator Lodge for distributing the electoral vote. The electoral college would be retained and the smaller states thus continue to have the votes corresponding to the number of their representatives—apportioned by population—and two additional votes corresponding to the two senators. These votes, however, would be distributed in accordance with the popular vote in their state, thus making the electoral vote more nearly correspond with the popular vote and lessening the possibility of the election of a President who had received a minority of the popular vote.[4]

Also to be considered is an amendment providing for the ratification of treaties by a majority vote of each house of Congress instead of by a two-thirds vote of the Senate. This would bring the Constitution in line with practicality. Most treaties and executive agreements require implementation by legislation. Later legislation supersedes a treaty. Ratification by the Senate is circumvented by the executive agreement device and by the concurrent resolution. As no treaty is really effective without congressional consent it is not illogical to insist that a treaty should be effective with this consent.[5]

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of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

L. Resolution filed with the Secretary of State, March 24, 1947.

M. By early February, 1949, the proposed amendment had been ratified by twenty-three states. Ratification by thirty-six states is required before the measure can go into effect.

[3]According to available records, no amendment providing for the deprivation of the Congressional right to impeach and try the President has ever been proposed.

[4]On March 25, 1948 (80th Cong., 2d Sess.), Senator Henry Cabot Lodge, Jr., of Massachusetts, introduced S.J. Res. 200. The measure, providing for the abolishment of the electoral college but distributing the electoral vote in each state in exact proportion to the popular vote, was referred to the Committee on the Judiciary. It was reported in the Senate on May 3, 1948. No further action was taken in that Congress.

On January 5, 1949 (81st Cong., 1st Sess.), Senator Lodge reintroduced the same joint resolution, as S.J. Res. 2. It was referred to the Committee on the Judiciary, which opened hearings on the resolution on March 9, 1949.

[5]Proposed amendments for ratification of treaties by a simple majority vote in both the Senate and the House of Representatives. All of the following proposals

One subject which the framers failed to think through was the vice-presidency. They made the Vice-President heir-apparent of the President, but empowered him only to preside over the Senate and to vote to break a tie. The result has not been happy. If a Vice-President is of presidential calibre and the President survives his term, there is a waste of good material. If the Vice-President is a Throttlebottom and the President dies in office, the nation suffers. Moreover, the President has more duties than any one man can perform, the Vice-President not enough to keep him occupied. Among the President's constitutional and therefore non-delegable duties are some that are purely formal—to "receive ambassadors and other public ministers," "to commission all the officers of the United States." Although perfunctory, these duties are time-consuming. Other constitutional and burdensome duties are: the signing of bills, the delivering of messages to Congress, the granting of reprieves and pardons.

A simple solution—but one that would require a constitutional amendment—would be to empower the President in his discretion to delegate any or all of these duties—and others that may be imposed upon him by the Congress—to the Vice-President. There could be no possible objection to the delegation of such routine duties as receiving ambassadors and signing commissions. In the granting of pardons almost invariably the President follows the advice of the Attorney General, which in turn is based upon the recommendation of the pardon attorney of the Department of Justice. Except in cases where there is the likelihood of a veto, the signing of bills is in the same category. To what extent the President would delegate his other duties would depend upon how completely he and the Vice-President were in accord. The subject is one that deserves exploration.[6]

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were referred to the Committee on the Judiciary (House or Senate); none was ever further acted upon.

(a.) H. J. Res 164. Introduced by Anthony J. Griffin, New York, July 28, 1919.
(b.) H. J. Res. 13. Introduced by Anthony J. Griffin, New York, April 11, 1921.
(c.) H. J. Res. 19. Introduced by Anthony J. Griffin, New York, December 7, 1925.
(d.) S. J. Res. 53. Introduced by Senator Claude Pepper, Florida, April 9, 1945.
(e.) H. J. Res. 16. Introduced by Chester E. Merrow, New Hampshire, January 3, 1945.
(f.) H. J. Res. 26. Introduced by Pat Cannon, Florida, January 3, 1945.
(g.) H. J. Res. 29. Introduced by Ed Gossett, Texas, January 3, 1945.
(h.) H. J. Res. 72. Introduced by Homer A. Ramey, Ohio, January 16, 1945.
(i.) H. J. Res. 8. Introduced by Ed Gossett, Texas, January 3, 1947.
(j.) H. J. Res. 26. Introduced by Chester E. Merrow, New Hampshire, January 3, 1947.
(k.) H. J. Res. 36. Introduced by Chester E. Merrow, New Hampshire, January 5, 1949.

[6] Proposed amendments providing for changes in the powers and duties of the Vice-President.

(a.) H. J. Res. 19 (80th Cong., 1st Sess.). Introduced by John C. Kunkel, of Pennsylvania, on January 3, 1947; referred the same day to the Committee on the Judiciary. No further action was taken.
The resolution provided for a First, Second and Third Vice-President, who,

These are only a few of a number of subjects that may well be considered if there is to be a reconditioning of the provisions of the Constitution which set up the Federal Government. There may be others which will require constitutional amendments. Certainly there are some—not relevant to this discussion—which may be effected without any amendment to the Constitution. Presidential succession can be regulated by statute. A mere change in the rules of Congress can permit members of the Cabinet to sit and speak in either house. At least one important change lies within the present power of the President: to select as members of his Cabinet policy-making coadjusters rather than administrators, administration being left to the under secretaries whose tenure would become more or less permanent, as is that of British civil servants.

The comprehensive program outlined is ambitious and unprecedented.[7] So far as I know no such single-package reform has ever been suggested. It would require either one extended or several integrated constitutional

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in the order named, were to succeed to the presidency or act as President in the event of a presidential vacancy. The Second Vice-President was to be President of the Senate, but with no vote save in case of a tie. The First and Third Vice-Presidents were to be assigned, by the President, duties in the executive establishment qualifying them to execute the presidential office. These officers could be appointed by the President to an executive office. Amendments to increase the number of Vice-Presidents had been proposed, incidentally, several times before in the course of congressional history; no changes in powers or duties, however, had been contemplated.

(b.) H. J. Res. 219 (80th Cong., 1st Sess.). Introduced by Emanuel Celler, of New York, on June 18, 1947; referred the same day to the Committee on the Judiciary. No further action was taken.
The resolution provided for the abolishment of the office of Vice-President; the Senate was to choose its own president and other officers.

(c.) S. J. Res. 25 (80th Cong., 1st Sess.). Introduced by Senator Harley M. Kilgore, of West Virginia, on January 10, 1947; referred the same day to the Committee on the Judiciary. No further action was taken.
The resolution authorized the President, with Senate ratification, to appoint a Vice-President should the office of President devolve upon the Vice-President, should the Vice-President be removed from office, or in case of the death, resignation or inability of the Vice-President to discharge the powers and duties of the office. The Vice-President would not be President of the Senate; that body would choose its own President. The Vice-President would enjoy such powers and duties in the executive branch as the President saw fit to assign to him for the purpose of assisting the former in the execution of the presidential office. The President by executive order could impose upon the Vice-President any or all of the powers and duties of the office of President.

[7]The sources of the materials and the notes in this article are: AMES, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History* in 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1896 (1897) (H.R. Doc. No. 353, 54th Cong., 2d Sess.); CONG. REC. (1947-1949) (particularly index volumes); DIGEST OF PUBLIC GENERAL BILLS WITH INDEX (1947-1949) (80th Cong., 1st and 2d Sess.); LOEFFLER, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES INTRODUCED IN CONGRESS FROM THE 69TH CONGRESS, 2D SESSION, THROUGH THE 79TH CONGRESS, DECEMBER 6, 1926, TO JANUARY 3, 1947; 61 STAT. 959; TANSILL, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES INTRODUCED IN CONGRESS FROM DECEMBER 4, 1889 TO JULY 2, 1926 (1926) (Sen. Doc. No. 93, 69th Cong., 1st Sess.).

amendments. Its consideration could be brought about in one of two ways. Congress by a two-thirds vote could propose the amendments which would become effective when ratified by three-fourths of the states. This method is impracticable. Congress is unlikely to find or take time adequately to consider such a comprehensive program. If it chose, it is likely to propose separate amendments. Some of these might be adopted and others rejected by the states. In such case the unity of the program would be marred.

The other method would be for the legislatures of two-thirds of the states to request Congress to call a convention which would consider proposed amendments which, if adopted by the convention, would have to be ratified by three-fourths of the states. This is the practicable method, for such a convention would not be distracted by other duties. No such convention for dealing with amendments has ever been called, and it is unlikely that there will be one called in the near future. Now, however, is the time to begin to work toward that end. The Revolution ended with the achievement of independence in 1783; the Federal Government did not begin to function until six years later. For more than a century and a half we have lived under a Constitution containing the defects that I have enumerated. At the proper time they should be and will be remedied. First, however, there must be a program of education. We need not be impatient, for as Thomas Jefferson said, eventually the people come to the right decision.

NON-DEVELOPMENT OF OIL AND GAS LEASES*

Earl T. Thomas†

Mississippi's infancy in oil production largely accounts for the comparatively few decisions dealing with oil and gas questions.[1] This factor, and very likely the considered actions of the lessees, based upon and conformably to a knowledge gained by the costly trial and error method, in other oil producing states, probably accounts for the fact that our Supreme Court has not, at this writing, handed down a decision directly involving the non-development of mineral leasehold estates. The trial courts of the state, however, are beginning to feel the impact thereof,[2] and indications are that the appellate courts, state and federal, will have to announce shortly definitive rules governing the subject. Obviously, as long as "Discovery" was the theme song of the lessor-lessee barbershop quartette there was harmony, but when the theme was changed to "Development", discord among the voices then became evident.

Though other oil and gas producing states have a rather large body of oil and gas law in comparison with Mississippi, nonetheless, oil and gas law today is yet in the period of development. The industry has found that its business practices and forms cannot be patterned altogether upon those in related fields. The courts also have felt the inadequacy of accepted concepts and principles in apparently analogous situations in their adjustment to cope with the problems presented in oil and gas litigation.[3] There has been, perforce, as to oil and gas, a development of a body of law that is *sui generis*.[4]

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*An address delivered before the Mississippi Landmen's Association, at Jackson, Mississippi, on February 14, 1949.

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[1]Prior to September 5, 1939, when the Tinsley Field came in, there were only six cases decided by the Mississippi Supreme Court, and since that date, this Court has handed down about forty-three cases, directly concerning oil and gas questions. See Hall, *The Application of the Determinable Fee Theory in Construing the Mississippi Mineral Lease,* 19 MISS. L.J. 291 (1948).

While our Supreme Court has passed upon two cases, *viz.*: (1) Love Petroleum Co. v. Atlantic Oil Producing Co., 169 Miss. 259, 152 So. 829 (1934), *sugg. of error overruled,* 169 Miss. 259, 153 So. 389 (1934), and (2) Lloyd's Estate v. Mullen Tractor and Equipment Co., 192 Miss. 62, 4 So.2d 282 (1941), wherein the contention of non-development was raised, the first of these cases went off on another question, and the second concerned a lease wherein implied covenants were excluded. Hence neither is authority on the implied obligation to develop.

[2]Among others, there are at least three such cases pending in the trial courts involving alleged non-development, *viz:* Armstrong v. California Co., (CA No. 356, S.D. Miss.) (*re:* non-development of a different horizon and off-set well obligation); Berry v. Tide Water Associated Oil Co., (CA No. 454, S.D. Miss.) (*re:* non-development of an assigned portion of lease); Gordon v. Superior Oil Co., (No. 3160, Chan. Ct. of Jefferson Davis County, Miss.) (*re:* non-development of the leasehold generally and also concerning the protection or off-set well obligation).

[3]Ethridge, *Oil and Gas Division Orders,* 19 MISS. L.J. 127 (1948).

[4]24 AM. JUR. 516.

When and as confronted with the thorny question of non-development, we know that our own Supreme Court will have occasion to canvass the field of the best reasoned cases from other jurisdictions, and in the light of and consistently with its previously declared rules of property and basic concepts in comparable subjects, evolve and announce sound and workable rules and decisions. After all, as declared by Mr. Justice Cardozo, "The rule that functions well produces a title deed to recognition."[5] Not only from the standpoint of pride, but from an objective evaluation of the decisions thus far declared by our Supreme Court on oil and gas law, do we say that our Court has charted its course well.[6] Though the Mississippi decisions are well documented with citations from most all of the oil producing states, we must admit there appears a predilection for the Texas cases.[7] Sufficient justification, if such there need be, appears when we recall that our Court, as the Texas courts, has construed the ordinary oil and gas lease as transferring to the lessee a determinable fee estate in the minerals, i. e., has held that the mineral lease is actually a conveyance, passing a determinable fee estate to the lessee.[8] Because, however, as will be hereinafter pointed out, of some basic rules of property, it is not altogether certain that Mississippi's decisions on the question of non-development will square with the Texas decisions in all respects.

The term "non-development", loosely used, would entail a discussion of (1) non-development of the lease in the failure to drill the initial or discovery well on the leased premises or otherwise to test the land for oil and gas within a reasonable time, and (2) non-development in the failure to protect the land from drainage by the use of reasonable diligence in drilling offset or protection wells as well as (3) non-development in the failure to develop the lease with reasonable diligence after production is obtained. This paper, for the reasons next given, will be concerned primarily, though not entirely, with the term "non-development" when used in the latter aspect, i. e., with reference to the failure or alleged failure to develop the lease with reasonable diligence after production is obtained.

Non-development, when used in the sense of failure to test the land

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[5]Cardozo, The Nature of the Judicial Process 103 (1921).

[6]Wade, *Recent Mississippi Oil and Gas Cases,* 18 Miss. L.J. 243-266 (1947).

[7]*E.g.,* observe the influence in: Stokely v. State *ex rel.* Knox, 149 Miss. 435, 115 So. 563 (1928), of Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290 (1923); Cummings v. Mid-States Oil Corp., 193 Miss. 675, 9 So.2d 648 (1942), of Grissom v. Anderson, 125 Tex. 26, 79 S.W.2d 619 (1925), and other Texas cases; Koenig v. Calcote, 199 Miss. 435, 25 So.2d 763 (1946) of Hager v. Stalkes 116 Tex. 453, 294 S.W. 835 (1925), and others.

[8]Hall, *supra* note 1, at 294; Wade, *supra* note 6, at 246; Note, 13 Miss. L.J. 427 (1941); Note, 13 Miss. L.J. 453 (1941); Koenig v. Calcote, *supra* note 7; Lloyd's Estate v. Mullen Tractor & Equipment Co., *supra* note 1; Stokely v. State *ex rel.* Knox, *supra* note 7; Calcote v. Texas Pacific Coal & Oil Co., 157 F.2d 216 (C.C.A. 5th 1946).

for oil and gas within a reasonable time, is excluded herein for the reason that the basic lease, in original or revised form, in current use in Mississippi, and as for that, in past use, is "Producers 88 Form Lease", which, like other leases, is an "unless" lease.[9] In it the parties expressly contract that drilling operations may be postponed by the payment of rentals, and the failure to commence operations within the primary term terminates the lease *ipso facto*.[10] Mississippi is expressly committed to the rule, unlike Indiana and formerly Kentucky,[11] that because of the express provisions in such "unless" lease no implied covenant inconsistent therewith will be imposed upon the lessee.[12] Therefore, for practical reasons, we need not prolong this discussion by an inclusion of this feature of the term.

The popular, if not technical, use of the term "non-development" might embrace that aspect concerning the failure to protect the land from drainage by the use of reasonable diligence in drilling offset or protection wells. Support for such inclusion can be found in various texts and articles.[13] I shall here make brief reference to the off-set well obligation, incident to protection.

Non-Development by Failure to Protect the Land from Drainage by the Use of Reasonable Diligence in Drilling Offset or Protection Wells

Unquestionably, the covenant to protect the premises against drainage by drilling protection wells is more zealously guarded by the courts than any of the other covenants.[14] The prime consideration is the prospective loss of an irreplaceable natural resource, unlike a pretermitting of the enjoyment thereof, as is the case relative to other covenants. The courts over the land have been more generally uniform in the construction and enforcement of this covenant than in others. Hence the industry is usually well aware of and better informed as to this obligation. The importance of the matter, in some states, has resulted in the passage of applicable statutes.[15]

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[9]Hall, *supra* note 1, at 293; Pressler, *Implied Covenants in Oil and Gas Leases*, 18 Miss. L.J. 403 (1947).

[10]Pressler, *supra* note 9, at 406.

[11]2 Summers, Oil and Gas § 396 (Perm. ed. 1938).

[12]Lloyd's Estate v. Mullen Tractor & Equipment Co., *supra* note 1.

[13]*Cf.* Summers, *op. cit. supra* note 11 at 289-398 (wherein also included is covenant to operate and market with diligence); 31-A Texas Jurisprudence § § 133-144 (1947); 24 Am. Jur. 548-549; but see Walker, *Express Clauses in Oil and Gas Leases Affecting the Usual Implied Obligations of the Lessee*, 13 Miss. L.J. 292-306, at 300-304 (1941); and Pressler, supra note 10.

[14]Walker, *supra* note 13, at 302.

[15]Kentucky, Iowa, Arkansas. 2 Summers, *op. cit. supra* note 11 at 346, and 1948 Cum. Pockets Parts thereto, at 73.

Most of the present leases in use in Mississippi contain an express covenant relative to the off-set well obligation, which in whole or in part, is but a rescript of what the courts have declared the implied covenant in this regard to be. Producers 88—Revised—Mississippi A is illustrative, to-wit:

> In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within 200 feet of and draining the leased premises, lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances.

The quoted provision is but expressive of the implied covenant save for the inclusion of the words, "and within 200 feet of," and substitution of "adjacent land" for "other land" or "nearby land." Though the quoted words above be in large part a rescript of the implied covenant, yet by virtue of being embodied in the lease in express terms, with the inclusion of the qualifying words, "and within 200 feet of," the language is undoubtedly exclusive and leaves no room for implication, under the decision in *Lloyd's Estate v. Mullen Tractor and Equipment Company*.[16] Under the express contractual provision, surely as one of the factors justifying the offset well, the offending or draining well would have to be on adjacent land within 200 feet of the leased premises.[17]

This covenant applies during the fixed or primary term as well as to the indefinite or "so long thereafter" term.[18] All of the courts appear to hold that the lessor, during the fixed term, may refuse to accept a delay rental payment, if drainage is in progress, and demand that the lessee drill a protection well.[19] Most of the courts hold that acceptance of delay rental payments, when and if drainage is occurring to the knowledge of lessor, waives the breach of the covenant.[20] A few of the courts have held that such acceptance, even though drainage is in progress to knowledge of lessor,

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[16]*Supra* note 1.

[17]Humble Oil & Refining Co. v. Strauss, 243 S.W. 528 (Tex. Civ. App. 1922). See also 2 SUMMERS, *op. cit. supra* at 298-301; 31-A TEXAS JURISPRUDENCE 216; Linn v. Wehrle, 35 Ohio App. 107, 172 N.E. 288 (1928); Wolter v. Houston Oil Co., 74 S.W.2d 706 (Tex. Civ. App. 1934); Magnolia Petroleum Co. v. Page, 141 S.W.2d 691 (Tex. Civ. App. 1940); Simms Oil Co v. Flewellen, 156 S.W.2d 521 (Tex. Comm. App. 1941).

[18]GLASSMIRE, OIL AND GAS LEASES AND ROYALTIES 245 (2d ed. 1938); Gypsy Oil Co. v. Marsh, 121 Okla. 135, 248 P. 329 (1926); State Line Oil & Gas Co. v. Thomas, 35 S.W.2d 746 (Tex. 1931); South Penn Oil Co. v. Snodgrass, 71 W.Va. 438, 76 S.E. 961 (1912).

[19]MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES 250-252 (2d ed. 1940); Walker, *supra* note 13, at 303.

[20]MERRILL, *op. cit. supra* note 19 at 245-246, and cases cited in footnotes.

does not preclude lessor from recovering damages for the failure to drill the protection well.[21]

Moreover the right and obligation to drill and where to drill may be regulated by valid rules promulgated pursuant to authority, validly and constitutionally conferred by the Legislature on the State Oil and Gas Board. Mississippi now has, in the main, an admirable Oil and Gas Conservation Act, as reflected by Chapter 256 (House Bill 80), Laws of 1948.[22] The duties of a lessee, whether by express or implied covenant, seem to be subordinate to valid governmental regulation in the form of proration orders, or in the form of pooling arrangements to secure space for a well.[23] Unit operation, whether voluntary or compulsory, comes in for its consideration relative to covenants, for lessors do not have the same rights as possessed prior to the unitization.[24]

Inasmuch as remedies of the lessor for the breach of the covenant to drill protection wells closely parallel those for breach of the covenant to develop the lease with reasonable diligence, we shall not here allude to them, but reserve such discussion for its appropriate place under a treatment of the latter covenant.

The following are factors which must co-exist and be shown by the complaining lessor who seeks to recover damages or cancel, in whole or in part, the lease for breach of the implied covenant (and which, with the exception hereinabove noted, is the same as the express covenant in this regard in Producers 88—Revised— Mississippi—A Lease) to protect the land from drainage by the use of reasonable diligence in drilling offset or protection wells: (1) Lessor must show that such drainage occurs and that it is substantial in amount.[25]

(2) Lessor must prove that there is reasonable probability that the offset wells can be drilled profitably, to the end that lessee will receive a

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[21]Texas Co. v. Ramsower, 7 S.W.2d 872 (Tex. Comm. App. 1928); Walker, *supra* note 13, at 302-305.

[22]Coleman, *The New Mississippi Oil and Gas Conservation Act,* 20 MISS. L.J. 51 (1948).

[23]Magnolia Petroleum Co. v. Stroud, 3 S.W.2d 462 (Tex. Civ. App. 1928); Croxton v. State, 186 Okla. 249, 97 P.2d 11 (1939); Butler v. Jenkins Oil Corp., 97 S.W.2d 466 (Tex. Comm. App. 1936); MERRILL, *op. cit. supra* note 19, at 478; Myers, *Spacing, Pooling and Field Wide Unitization,* 18 MISS. L. J. 267 *et seq.* (1947).

[24]Crichton v. Lee, 209 La. 561, 25 So.2d 229 (1946); Alston v. Southern Prod. Co., 207 La. 370, 21 So.2d 383 (1945); Hardy v. Union Prod. Co., 207 La. 137, 20 So.2d 734 (1945); Hood v. Southern Prod. Co., 206 La. 642, 19 So.2d 336 (1944); Placid Oil Co. v. North Central Texas Oil Co., 206 La. 693, 19 So.2d 616 (1944); Hunter Co. v. Shell Oil Co., 211 La. 893, 31 So.2d 10 (1947); Ohio Oil Co. v. Kennedy, 28 So.2d 504 (La. App. 1946); Jacobs, *Unit Operation of Oil and Gas Fields,* 57 YALE L.J. 1220 (1948).

[25]2 SUMMERS, *op. cit. supra* note 11, at 338-345.

reasonable profit over and above the cost of drilling, equipping and operating the offset wells.[26]

(3) The standard of conduct required of lessee is the conduct of a reasonably prudent operator.[27] However, in this connection, it is believed that lessee's conception of such standard of compliance, if not fraudulently exercised, will be of persuasive, if not controlling, importance, as to operations under said Producers 88—Revised—Mississippi A lease, because of the inclusion of this sentence immediately following the express covenant as to offset wells: "The judgment of the lessee, when not fraudlently exercised, in carrying out the purposes of this lease shall be conclusive." The quoted words were accorded effect in the Texas case of *Magnolia Petroleum Company v. Page,*[28] as were similar words in *Cowden v. Broderick and Calvert.*[29]

(4) There should be no distinction between a situation where the alleged drainage occurs from lands leased to the same lessee, and from lands leased to other lessees. In other words, the duty of protection should not be rendered more onerous by virtue of the fact that the lessee owns the draining well or wells. Most courts hold that said duty of protection is not more onerous,[30] but there are some courts that hold otherwise.[31]

(5) Lessor must prove that a reasonably prudent operator, with full knowledge of all of the facts and circumstances, in the exercise of ordinary care, would have drilled offset wells with the reasonable expectation of producing oil or gas therefrom in paying quantities.[32]

(6) Lessor must prove that the offending or draining wells on adjoining lands are producing in paying quantities.[33]

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[26]MERRILL, *op. cit. supra* note 19, at 255-259.

[27]*Ibid.*

[28]141 S.W.2d 691 (Tex. Civ. App. 1940).

[29]113 Tex. 434, 114 S.W.2d 1166 (1938).

[30]Cooper v. Ohio Oil Co., 25 F. Supp. 304 (Wyo. 1938), *aff'd on other grounds,* 108 F.2d 535 (C.C.A. 10th 1939); Austin v. Ohio Fuel Co., 218 Ky. 310, 291 S.W. 386 (1927); Broswood Oil & Gas Co. v. Mary Oil & Gas Co., 164 Okla. 200, 23 P.2d 387 (1933).

[31]Humphreys Oil Co. v. Tatum, 26 F.2d 882 (C.C.A. 5th 1928), *cert. denied,* 278 U.S. 633 (1928); Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163 (1937); Swope v. Holmes, 169 La. 17, 124 So. 131 (1929). For a critique of the theories, see MERRILL, *op. cit. supra* note 19, at 259-261.

[32]Brewster v. Lanyon Zinc Co., 140 F. 801 (C.C.A. 8th 1905); Goodwin v. Standard Oil Co., 290 F. 92 (C.C.A. 8th 1923); State Line Oil & Gas Co. v. Thomas, *supra* note 18; Eastern Oil Co. v. Beatty, 71 Okla. 275, 177 P. 104 (1918); 2 SUMMERS, *op. cit. supra* note 11, at 374.

[33]2 SUMMERS, *op. cit. supra* note 11, at 371-373, and cases cited. Acknowledgment is hereby made, in connection with summaries and citations in notes 25 to 33 herein, of use of trial brief prepared in *Armstrong v. California Co., supra* note 2, by William N. Ethridge, Jr., former member of firm of Wells, Wells, Newman & Thomas and now professor of law at University of Mississippi Law School.

(7) As to obligations arising under Producers 88—Revised—Mississippi A leases, it would seem that lessor must also prove that the offending or draining well or wells are located on "adjacent"[34] lands, and not separated by an intervening strip belonging to other parties, and that said offending or draining well or wells are located within 200 feet of leased premises.[35]

The Development Obligation After Production

Among other provisions, the usual oil, gas and mineral lease contains a granting clause, a term clause, royalty clauses, drilling or delay rental clauses,[36] and an assignment clause. Modern leases, in current use in Mississippi, also generally contain pooling provisions.

To understand the legal problems presented in a lease, one must appreciate the distinction between limitations, conditions and covenants.

A limitation comes into play where in the creation of the estate its existence is so limited that the estate will automatically terminate upon the happening of certain conditions. Practically all leases in Mississippi are the "unless" type, and are for a stipulated term of years, commonly called the "primary term", and they additionally provide that they will continue in effect after the primary term so long as oil or gas is produced therefrom or operations for drilling or reworking are conducted thereon. They also set forth that if drilling operations are not commenced within one year after date, the lease will terminate unless rentals are paid, and authorize deferment of drilling operations thereafter for successive twelve-month periods during the primary term by similar rental payments. Provision is made for resumption of rental payment should a dry hole be drilled or production cease after once being obtained. These provisions constitute limitations upon the estate of the lessee, causing termination *ipso facto* at the end of the primary term in the absence of production or drilling or reworking operations. Texas recognizes another instance of an estate by limitation as to said lease, and that is the cessation of the use of the premises for the purposes for which they were leased.[37]

A condition exists where the occurrence of the event does not automatically terminate the estate granted, but merely gives the option to the lessor to terminate same.[38] Conditions subsequent are those which operate upon an estate already vested and render it liable to be defeated. They are

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[34]Wolter v. Houston Oil Co., *supra* note 17.
[35]Wilkins v. Nelson, 161 La. 437, 108 So. 875 (1926).
[36]Walker, *supra* note 13, at 294.
[37]Pressler, *supra* note 9, at 403-404.
[38]*Ibid.*

strictly construed, in Mississippi particularly,[39] for it has been held by our Supreme Court that a deed conveying land to the levee board, "for levee purposes", without more, does not create a "condition subsequent" for breach of which land reverts to grantor's heirs.[40] Equity courts have an aversion for such conditions, or, as generally stated, "equity abhors a forfeiture".[41] We need not further consider the term "conditions" for the reason that "unless" leases do not usually contain any such conditions.

A covenant merely imposes on the covenantee the obligation to perform a certain act or acts, in default of which performance the lease does not terminate the estate automatically but merely gives to the lessor the right and option to terminate the estate, or sue for damages.[42] Lease covenants are of two kinds, express and implied. As we have already noted "Producers 88—Revised—Mississippi A" lease contains an express covenant relative to the offset well obligation, but, as noted, said covenant is, with a slight modification, but the implied covenant in express terms, that is, the covenant which the law would imply and read into the lease anyway.

The courts have been uniform in holding that the main consideration to the lessor for his lease is the royalty which he expects to receive from its development,[43] or as Professor Walker has expressed it, "*** the lessee is under the implied duty to do everything that a reasonably prudent operator should do in operating, developing and protecting the property so as to insure a reasonably rapid accrual of the largest royalties practicable, due consideration being given to the interests of both the lessor and lessee ***".[44] Hence consideration of the question of non-development of the leasehold will devolve largely about the treatment of legal problems and penalties incident to the breach of the covenant (express or implied) to develop the lease with reasonable diligence after production is obtained.

Let us here say a word, however, as to the construction given by the courts as to covenants, or leases generally. Conditions peculiar to the oil and gas industry, coupled with the well-known fact that leases are prepared by the lessee, have prompted the courts of the other states to hold that uncertainties and ambiguities in a lease must be construed in favor of the

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[39]Gadberry v. Sheppard, 27 Miss. 203 (1854); Soria v. Harrison County, 96 Miss. 109, 50 So. 443 (1909).

[40]Nicholson v. Myres, 170 Miss. 441, 154 So. 282 (1934). *Accord:* Soria v. Harrison County, *supra* note 39.

[41]Thornton v. City of Natchez, 88 Miss. 1, 41 So. 498 (1906).

[42]Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W.2d 27 (1929); Grubb v. McAfee, 109 Tex. 527, 212 S.W. 464 (1919); Pressler, *supra* note 9, at 403.

[43]31-A Texas Jurisprudence 217; 24 Am. Jur. 549.

[44]Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas,* 11 Tex. L. Rev. 399-401 (1933).

lessor.[45] Though Mississippi has construed instruments generally against the party preparing them,[46] our Court, nevertheless, in *Love Petroleum Company v. Atlantic Oil Producing Company,* in 1934, held that an oil and gas lease "must be construed favorably to the lessee".[47]

We next separately consider (1) express covenants, and (2) implied Covenants, in relation to the covenant to develop the lease with reasonable diligence after production is obtained.

Express Covenants Relative to Development

As was held by our Court in *Lloyd's Estate v. Mullen Tractor and Equipment Company,*[48] "it is elementary that an express stipulation upon a matter excludes the possibilty of an implication upon the same subject". Leases currently in use in Mississippi generally contain no express covenant relative to the duty of development after producton is obtained on the premises. It is true that Producers 88—Revised—Mississippi A lease does contain the sentence: "The judgment of the lessee, when not fraudulently exercised, in carrying out the purposes of this lease shall be conclusive." But, as we know, this admeasures the standard of compliance with the covenant, and does not set forth the covenant. This quoted provision has been accorded full effect in Texas in the case of *Magnolia Petroleum Company v. Page.*[49] Except to the extent just noted as to *bona fide* judgment of the lessee being given effect, we find no express covenant as to duty of development proper in "Producers 88—Revised—Mississippi A" lease and in other leases currently in use in this state. Occasionally additional clauses may be typed in, and some have also been found in a few printed forms used formerly, which variously provide either for (1) drilling a certain number of wells on the lease within a certain period after discovery, as seen in such cases as: *Gulf Production Company v. Kishi,*[50] in Texas, *Hartman Ranch Company v. Associated Oil Company,*[51] in California, and *Stoddard v. Emery,*[52] in Pennsylvania; (2) that after discovery, lessee shall continue with development by commencing a new well within a certain

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[45]24 Am. Jur. 551.

[46]Home Mutual Ins. Co. v. Pittman, 111 Miss. 420, 71 So. 739 (1916).

[47]169 Miss. 259, 152 So. 829 (1934), *sugg. of error overruled,* 169 Miss. 259, 153 So. 389 (1934). Though two grounds of decision are given in the opinion for the affirmance of the case, and despite the fact that alternative bases of decision do not condemn one or the other as dictum, it is not sure that our Court will hold it necessary for the decision hereinabove set out. As to mineral deeds, however, in line with the rule of construction as to deeds generally, our Court in 1947 held in Gulf Refining Co. v. Stanford, 202 Miss. 602, 30 So.2d 516 (1947), that "reservations must be construed most strongly against the grantor and in favor of the grantee," citing 26 C.J.S. § 140(b).

[48]192 Miss. 62, 4 So.2d 282 (1941).

[49]141 S.W.2d 691 (Tex. Civ. App. 1940).

[50]129 Tex. 487, 103 S.W.2d 965 (1937).

[51]10 Cal.2d 232, 73 P.2d 1163 (1937).

[52]128 Pa. 436, 18 A. 339 (1889).

number of days after the completion of each prior well, as in the Texas case of *Terrell v. Munger Farms Company*,[53] and (3) various other express covenants as to drilling. Where express covenants appear, of course, compliance must be had, unless non-compliance is excused by the lease or by law. Unless the express covenant as to development is based upon or integrated with, appropriate language, the "prudent operator" qualification inherent in the implied covenant, defenses available for a breach of the latter covenant are unavailing.

Fundamentally, the omission of an express covenant as to development in most printed forms of leases stems from (1) the impracticability and (2) the danger thereof. If such covenant is included, setting out a pattern of development, great injustice can be visited upon either of the parties to the lease, whether in a "wildcat" or proven production area. The type and effectiveness of the various propulsion forces, as water drive, gas cap drive or dissolved gas drive, and the porosity and permeability of the sands, all enter the picture. Even in proven territory, the possibility of production from different horizons can effect inequities. Complications can arise under the assignment clause, as well as other problems.

Thus it is that we approach the basic consideration or premise of the subject of development or non-development—the implied covenant.

The Implied Covenant to Develop the Lease with Reasonable Diligence after Production Is Obtained

Because of the general absence of express covenants in the usual Mississippi lease as to development, any litigation in this State concerning non-development of the lease after initial production thereon will likely be based upon an alleged breach of the implied covenant in this regard.

The implied covenant is a fiction used, however, like many other fictions of the law, to accomplish a desirable result. The obligation thereby imposed results not from the express agreement of the parties to the lease, but by operation of law.[54] By use of a fiction (which has been designated as a "pious fraud" by a distinguished judge),[55] the law simply reads into a contract something the parties did not expressly agree upon and possibly something the parties did not even consciously have in mind,[56] when they executed the lease. The courts have, in effect, held that contractual implications are justified only on the ground of necessity and fair dealing.[57]

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[53]129 S.W.2d 407 (Tex. Civ. App. 1939).
[54]Merrill, *op. cit. supra* note 19, at 27.
[55]Cardozo, *op. cit. supra* note 5, at 116.
[56]Merrill, *op. cit. supra* note 19, at 27.
[57]31-A Texas Jurisprudence 225.

That implied covenant is the covenant to develop the lease with reasonable diligence after production is obtained,[58] or "to develop the premises with due dilgence after production is obtained".[59] Professor Summers defines it: "A covenant, if oil and gas be found in paying quantities, to proceed with reasonable diligence in drilling sufficient number of wells to reasonably develop the premises."[60] In the absence of drainage, the lessee, under the "unless lease," may defer the commencement of drilling operations during the primary term by the payment of delay rentals. If and when production in paying quantities has been obtained on land during the primary term or pursuant to drilling operations commenced during the primary term and timely prosecuted (and such must happen, else the leasehold terminates *ipso facto*), then the implied covenant to develop with reasonable diligence comes into play. This covenant applies during the primary term as well as the indefinite term.[61]

In this connection, let us assume the following skeletal facts: Mr. Anxious is the owner of "Balance Due" Farm consisting of Section 32, or 640 acres, situated in strictly "wildcat territory." He executes in favor of The Cautious Oil Company the usual Mississippi "unless" type of oil, gas and mineral lease thereon, the primary term of which is five years. Being the usual lease, it contains no express provisions as to the pattern or rate of development after the initial or exploratory well comes in, producing oil or gas in paying quantities. Three years thereafter, oil in paying quantities is found on other lands in the "discovery well" for the area, located about one mile from the northeast corner of Section 32. The fever is on; the "Black Gold" Field has been discovered and appropriately named. Having kept its lease in force by timely payment of delay rentals, The Cautious Oil Company drills on the NE¼NE¼, or northeast corner of Section 32, and an oil producer, the Anxious-Cautious Co. No. 1 well, results. Wells on neighboring lands are coming in, but not sufficient to drain any part of Section 32. In the meantime, some dry holes are being drilled also on neighboring lands. The geology on Section 32 is being reconsidered by lessee Cautious Company, and the picture is not too bright. Furthermore, the price and demand for oil is decreasing. Cautious Company holds off further development. It is at this juncture that the lessor and lessee begin to show their true colors, and each begins to live up to his or its name. Anxious demands an additional well to be begun within three months. Cautious Company demurs. They confer. Anxious fretfully exclaims,

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[58]Pressler, *supra* note 9, at 406.
[59]Glassmire, *op. cit. supra* note 18, at 244.
[60]2 Summers, *op. cit. supra* note 11, at 309.
[61]Gypsy Oil Co. v. Marsh, *supra* note 18; State Line Oil & Gas Co. v. Thomas, *supra* note 18; South Penn Oil Co. v. Snodgrass, *supra* note 18; Glassmire, *op. cit. supra* note 18, at 245.

"Make haste," while Cautious Company timidly replies, "Yes, but let's make haste slowly." It is obvious that at this stage the rights and duties of the parties collide.

The crucial question brought to focus in the above assumed case is, what is "reasonable diligence"? Repeatedly have the courts held that, after initial production is obtained, the measure of diligence as to the number, manner, time and location of wells to be drilled by the lessee is a question to be determined by the facts and circumstances of each particular case.[62] On this issue of reasonable diligence, as shown, the views of the lessor and lessee are quite often widely divergent. The lessor is, as it were, getting a "free ride" as to operations cost and is tremendously interested in the optimum royalty returns as rapidly as possible. The lessee, who, as to operations, "pays the freight", has innumerable considerations to influence his decision to drill or not drill. Physical facts as to the leased lands and as to oil and gas sands under them call for the judgment of the geologist and petroleum engineer, concerning the probability of oil or gas production, the depth, extent, contour, thickness, porosity and permeability of said sands, and the likely quality and gravity of the oil. The type, sustaining character and life of the various drives to propel and expel the minerals is a vital factor in the decision. Economics likewise materially influence the decision, such as costs of drilling, equipping and operation of the wells, the cost of storage, marketing facilities, prevailing prices of oil or gas from the field, the operative force of supply and demand, and the existent regulations of the governmental agencies.[63] Multiple other factors enter the picture, too numerous here to recount. All of these factors should be evaluated, in advance by the lessee, and if and when litigation ensues, these same factors are to be considered by the court or jury in determining whether the lessee has breached the implied covenant to develop the lease with reasonable diligence after production has once been obtained.

The next question that logically appears is from whose standpoint must these facts be viewed—the lessor, the lessee, or some other person, natural or fictitious. In other words, what standards of compliance have been created by the courts? Here there is a conflict among the courts of the various states.

One of the standards of compliance or diligence is that the lessee's own good faith judgment is controlling.[64] In an early Pennsylvania case,[65] it was held by the Court:

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[62] 2 SUMMERS, *op. cit. supra* note 11, at 338.
[63] *Id.* at 376-379.
[64] *Id.* at 388.
[65] Young v. Forest Oil Co., 194 Pa. 243, 45 A. 121 (1899).

> . . . The operator, who assumed the obligations of the lease, has put his money and labor into the undertaking, and is now called upon to determine whether it will pay to spend some thousands of dollars more in sinking another well to increase the production of the tract, is entitled to follow his own judgment. If that is exercised in good faith, a different opinion by the lessor, or the experts, or the court, or all combined, is of no consequence, and will not authorize a decree interfering with him.

However, later cases from Pennsylvania[66] show that the above offspring was apparently deserted and abandoned, to re-appear on the doorsteps of the courts of other states. Indiana seems to acknowledge the "good faith judgment of lessee" as a rule of property, and the decisions indicate that Kentucky, Ohio and West Virginia have either vacillated between, or else confused, this rule and the "ordinarily prudent operator" rule.[67] From the quoted excerpt above, the logic thereof cannot be condemned, but it is not the current of authority. In this connection, we recall that Producers 88—Revised—Mississippi A lease, as elsewhere in this paper pointed out,[68] has an almost *verbatim* statement of this rule of "good faith judgment of lessee", and that Texas has given effect thereto in *Magnolia Petroleum Company v. Page,*[69] in a lease containing identical words, even though Texas follows the "ordinarily prudent operator" rule.

The standard of compliance or diligence most generally recognized as to the development obligation is that of the "ordinarily prudent operator",[70] as aptly set forth by Mr. Justice Van Devanter (then Circuit Judge) in *Brewster v. Lanyon Zinc Company,*[71] as follows: "Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required."

It was also set forth in that decision that there is difficulty in laying down any comprehensive rule in respect of a question which is so largely one of fact that "it must be resolved in each case according to its particular circumstances". Nevertheless, there are many factors considered by the courts as affecting the problem of whether the lessee has acted as an operator of reasonable prudence. Among them are: (1) location of leased lands, whether in "wildcat" territory or in a producing field, (2) probable quantity of oil and gas capable of being produced as indicated by prior ex-

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[66] *E.g.,* Highfield Co. v. Kirk, 248 Pa. 19, 93 A. 815 (1915).
[67] MERRILL, *op. cit. supra* note 19, at 295-320.
[68] See notes 28 and 45 *supra.*
[69] *Supra* note 29.
[70] MERRILL, *op. cit. supra* note 19, at 277.
[71] 140 F. 801 (C.C.A. 8th 1905).

ploration and developments; (3) the presence of a profitable market, or of facilities for transporting and marketing the products; (4) the extent and results of operations on adjoining land; (5) the extent of the area normally drained by a well in the field; (6) the extent of the subterranean oil reservoir, and the character of the natural reservoir; (7) the expenditures and efforts of lessee to secure production or to operate producing wells or to protect against drainage; (8) the usages of the business; (9) cost of drilling, producing and marketing; (10) existence of an economic depression; (11) the thickness and productivity of the various sands; (12) territory likely to be drained by a well; (13) the number of wells in comparison to the area under lease; and (14) long acquiescence by the lessor.[72]

It is in the light of these and other relevant factors that the court or jury in the trial court, or the appellate court on appeal, must judge whether the lessee's conduct has been such as would have been expected of an "ordinarily prudent operator" under the same or similar circumstances, considering the interests of both lessor and lessee. Most all of the courts hold that the lessee is not expected to do business at a loss, purely for the benefit of the lessor. He, the lessee, must have a profitable undertaking in view, but the knotty question with the courts is as to how much profit must be in prospect before the law will compel the operator to act under the implied covenant for development of the leased premises. Prudent business men are not going to stay in business simply upon a program of breaking even, and surely it seems that the proper rule is that the lessee is not required to enter upon a program of development unless the circumstances indicate that he may reasonably expect a fair return upon his money,[73] to be determined according to the experience of the business.

In the absence of any express provisions in the lease modifying, or expressly negating,[74] the implied covenant to develop, the "ordinarily prudent operator" rule as to the standard of diligence in development is followed in: Texas, Oklahoma, Louisiana, Montana and New Mexico, and some other states have occasionally confused the rule with the "good faith judgment" rule aforesaid. Because the fictitious person, the "ordinarily prudent operator" or his counterpart, is so well known in Mississippi jurisprudence in analogous situations, we believe our Court will subscribe to this standard, when and as the proper case is presented.

We have thus referred to the two standards of diligence in development. Both of the standards absolve a lessee from drilling further or addi-

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[72]MERRILL, *op. cit. supra* note 19, at 285-288.

[73]*Id.* at 291. Texas Pacific Coal & Oil Co. v. Barker, 117 Tex. 418, 6 S.W.2d 1031 (1928); Union Gas & Oil Co. v. Fyffe, 219 Ky. 640, 294 S.W.176 (1927).

[74]*E.g., see* Stanolind Oil & Gas Co. v. Christian, 83 S.W.2d 408 (Tex. Civ. App. 1935) and Lloyd's Estate v. Mullen Tractor & Equipment Co., *supra* note 1.

tional wells if such drilling would probably result in nothing but loss to the lessee. The standards, therefore, do not cause the lessee to be under an absolute duty or obligation to drill additional wells.[75] He, the lessee, under either of the standards above, is entitled to a fair return over and above the cost of drilling, equipping and operating the additional well or wells to be drilled.

However, there are a few cases from a few states which seem to indicate that there is an external and absolute duty on the part of the lessee to work the lease or to give up such portions as he does not work.[76] These decisions hold that, even if the additional working or drilling would not be profitable to the lessee, nonetheless he must forfeit the portions not worked. Kansas seems to be the leader in this view. The case of *McCarney v. Freel*,[77] decided in 1926, is characteristic. In that case, the lessee had drilled one producing well and one dry hole. The court held that it was proper to cancel the lease, save for a tract sufficient in extent to afford proper facility for operating the producing well, despite the defendant's evidence, which the court accepted as correct, that conditions did not warrant further development. In the opinion of the court it is said:

> A lessee may not hold an entire quarter section of land with a single producing well after expiration of the term, any more than he may do so before expiration of term. The implied covenant, fairly to exhaust capacity of the land to produce mineral subsists. If the undeveloped portion of the land will not produce mineral in paying quantities, and the lessee would not be justified in drilling more wells, he may not continue to hold by virtue of a provision in the lease extending the term so long as oil or gas may be produced in paying quantities.

There are later cases[78] to the same effect. It might be said that abandonment entered the picture, but the facts of the case showed otherwise. A reading of some Arkansas cases is about as above quoted, as evidenced by this excerpt from *Smith v. Moody*:[79]

> Much testimony was offered as to the necessity of drilling other wells, the contention being that the wells now producing were at the edge of the producing fields and that new wells could not be drilled except at great loss. This contention may be disposed of by saying that, if true, the lessees have not been damaged by the can-

[78] *See* Nigh v. Haas, 139 Kan. 307, 31 P.2d 28 (1934).

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[75] Pressler, *supra* note 9, at 409.
[76] MERRILL, *op. cit. supra* note 19, at 320-338.
[77] 121 Kan. 189, 246 P. 500 (1926).
[79] 192 Ark. 704, 94 S.W.2d 357 (1936.)

cellation of so much of the contract of lease as cannot be profitably performed.

Kentucky,[80] Oklahoma[81] and Louisiana[82] have occasionally flirted with this doctrine. The doctrine of absolute duty, as it were, making lessee, whether profitable or not, proceed with development is in large part traceable to the United States Supreme Court decision of *Sauder v. Mid-Continent Petroleum Corporation,*[83] decided in 1934, arising in Kansas.

The writer believes the "ordinarily prudent operator" standard of diligence as to development is the fairest to all parties, and from its analogy to kindred fictitious persons already well known in our decisions, it will likely be favorably considered, if not adopted, by our Court. As shown, at opposite poles are the "good faith judgment of lessee" rule on the one end, and the "absolute duty" rule on the other. As to the latter, in the attempt to reconcile it with the "ordinarily prudent operator" rule, it has been said that the operator who clings tenaciously "to a trickle of oil from a nearby exhausted sand without further search can be prodded into activity by a proper application of the obligation to explore lower strata".[84] It is proper here that we now briefly refer to this latter obligation.

The implied covenant to use reasonable diligence to develop the leased premises definitely embraces, where the factual situation admits, the implied obligation to develop or explore lower or other strata or horizons from which there is present production. The latter obligation is largely made the basis of the suit of *George W. Armstrong v. The California Company* pending in the United States District Court of the Western Division of the Southern District of Mississippi, at Vicksburg. In the suit, it was alleged that the lessee had already drilled three paying oil wells on a certain plantation, one of which was drilled to the producing horizon known as the Wilcox and the other two to the Massive or lower Tuscaloosa. Plaintiff Armstrong alleged that lessee had discovered another producing sand, in its explorations, namely, the upper Tuscaloosa, and charged in addition that there was an additional profitable horizon or sand, to-wit, the Paluxy, underlying all of the others.

It has been well said that "the lessor ought not to demand that his lessee shall be a perpetual wildcatter".[85] Nevertheless, there are cases which hold that there is an obligation to attempt to develop production from

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[80]Hodges v. Mud Branch Oil & Gas Co., 270 Ky. 206, 109 S.W.2d 576 (1937).
[81]Scott v. Price, 123 Okla. 172, 247 P. 103 (1926).
[82]189 La. 645, 180 So. 473 (1938).
[83]292 U.S. 272 (1934).
[84]MERRILL, *op. cit. supra* note 19, at 337.
[85]*Id.* at 176.

lower strata where the data available gives reasonable ground for believing that they may contain profitable deposits.[86] Palpably only reasonable development may be required.[87] There is, of course, no obligation to embark upon deeper drilling if adjacent operations indicate the action futile.[88]

Development Problems Incident to Assignment of the Lease

Practically all leases in use in the State contain an assignment clause, in practically the same or similar phraseology. Assignment of the lease, in whole or in part, is expressly permitted. It is expressly contracted that default in payment of rentals, or non-compliance with provisions of the lease by lessee on the part retained or by an assignee, will not affect remaining portions of the lease on which rentals are paid or compliance is had. Provision is generally made for surrender of the lease, in whole or in part, by lessee or assigns, with corresponding release from all obligations, express or implied.

Berry v. Tide Water Associated Oil Company now pending in, and undecided by, the United States District Court for the Hattiesburg Division of the Southern District of Mississippi, is largely bottomed upon a construction of such an assignment clause, from two angles, viz: (1) whether production during the primary term on the retained part of the basic lease by the lessee and brother, as tenants in common, will inure to the benefit of two partial assignees of said basic lease as to segregated acreage, namely, Tide Water and Texas Gulf, and hold the lease past the primary term, when no production was had on the two latter assignees' portions of the lease when the lawsuit was filed; and (2) if the lease was carried beyond the primary term because production on the retained part inured to the benefit of Tide Water and Texas Gulf, then lessor Berry alternatively contended that each of said latter assignees had breached the covenant to develop the assigned portions with reasonable diligence.

At present there is no Mississippi decision on either point. Of prime consideration is whether the assignments to Tide Water and Texas Gulf, under the assignment clause, *ipso facto* made the basic lease divisible and severable *in toto,* as if thereby two additional leases, with identical provisions applicable only to the segregated acreage thus respectively assigned, came into being. Default in payment of delay rentals by lessee or assignees

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[86]Jones v. Interstate Oil Corp., 115 Cal. App. 302, 1 P.2d 1051 (1931); Webb v. Croft, 120 Kan. 654, 244 P. 1033 (1926); Southern Oil Co. v. Frazier, 206 Ky. 739, 268 S.W. 343 (1925); Logan v. Tholl Oil Co., 189 La. 645, 180 So. 473 (1938); Berthelote v. Loy Oil Co., 95 Mont. 434, 28 P.2d 187 (1934); Papoose Oil Co. v. Rainey, 89 Okla. 110, 213 P. 882 (1923).

[87]Central Kentucky Natural Gas Co. v. Williams, 249 Ky. 242, 60 S.W.2d 580 (1933).

[88]Masterson v. Amarillo Gas Co., 253 S.W. 908 (Tex. Civ. App. 1923).

was not the question, as lessee and assignees had fully and timely paid all delay rentals for the entire primary term, inasmuch as production was had on the basic lease in the last year of the primary term. The case was, therefore, unlike the Mississippi case of *White v. Hunt,* decided by our Court in 1942.[89] It is submitted that it has been uniformly held by all oil producing states who have passed on the question, with the exception of Louisiana, a civil law state, that sustained production during the primary term on any part of the basic lease, by lessee or assignee, will inure to the benefit of all of the other operators and hold and carry the lease past the primary term as to the other operators who had, until production, duly paid delay rentals. Texas,[90] Kansas,[91] Oklahoma,[92] New Mexico,[93] Arkansas,[94] West Virginia[95] and Kentucky[96] so hold. Louisiana holds to the contrary.[97]

So much for the assignment clause affecting the lease from the estate by limitations standpoint. We now consider the clause in relation to the implied covenant to develop the premises with reasonable diligence.

Despite Professor Summers' valiant attempt to maintain that the implied covenant to reasonably develop is indivisible, and that the various cases on the subject over the country can be thus reconciled,[98] there is, the other authorities hold, a hopeless conflict in the decisions. Many of the text writers maintain that the "balance of convenience seems to fall in favor of the rule of divisibility."[99] Thuss[100] expresses in this way the rule of divisibility of this covenant to develop when a partial assignment of the lease takes place:

> After one party has obtained production, and the lessee and his other assignees have benefited thereby, each from that time on must depend on his own conduct and acts of exploration and drilling for a compliance with the implied covenants, and can receive no help from the other segregated owners, if he has failed to perform the measure of development required of him. Each must properly develop his segregated portion.

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[89]193 Miss. 742, 10 So.2d 539 (1942).

[90]Cox v. Sinclair Oil Co., 265 S.W. 196 (Tex. Civ. App. 1924); Cosden Oil Co. v. Scarborough, 55 F.2d 634 (C.C.A. 5th 1932) (a Federal case applying the Texas law).

[91]Cowman v. Phillips Petroleum Co., 142 Kan. 762, 51 P.2d 988 (1935).

[92]Smith v. Gypsy Oil Co., 130 Okla. 135, 265 P. 647 (1928).

[93]State *ex rel.* Shell Petroleum Corp. v. Worden, 44 N.M. 400, 103 P.2d 124 (1940).

[94]Hughes v. Cordell, 174 Ark. 757, 296 S.W. 735 (1927).

[95]South Penn Oil Co. v. Snodgrass, *supra* note 18.

[96]Wilson v. Purnell, 199 Ky. 218, 250 S.W. 850 (1923).

[97]Roberson v. Pioneer Gas Co., 173 La. 313, 137 So. 46 (1931).

[98]3 SUMMERS, *op. cit. supra* note 11, at 185-199.

[99]MERRILL, *op. cit. supra* note 19, at 401 *et seq;* THUSS, TEXAS OIL AND GAS 188 (2d ed. 1935); Pressler, *supra* note 9, at 402-415.

[100]THUSS, *op. cit. supra* note 99, at 188.

What is believed to be one of the most lucid and best reasoned cases in the books on the subject of divisibility of this covenant, after partial assignment of the lease, is that of *Cosden Oil Company v. Scarborough*,[101] the decision being by Judge Hutcheson. He clearly holds, for the Court, that the implied covenant to develop is divisible, and that, on assignment of the lease, each assignee must, in effect, "paddle his own canoe" as to the development obligation. Arkansas definitely adheres to the divisibility theory,[102] while Oklahoma is squarely opposed, holding that the covenant is indivisible[103] Under the divisibility theory, each assigned portion of the basic lease is treated as a separate unit as to development, and it is no defense to an action for the breach of the covenant to develop on the assigned portion, that the facts show that the remainder of the lands covered by the basic lease have been so developed that extensive drilling thereon would have constituted adequate development had the basic lease remained intact. Under such theory, the assigned portion of the lease thus sought to be cancelled must stand or fall on the development or non-development on it, independently of its relation to the rest of the lands in the basic lease.

The two conflicting theories are not in this state now of too much practical concern, for the reason that we have had, at least since September 1, 1945, well spacing regulations permitting generally an oil well only on each forty acres. The situation then is quite unlike those in other states, during the days of feverish, intensive and, for a time, uncontrolled drilling. We have elsewhere, in this paper,[104] pointed out that the rights of the lessor and duties of the lessee, express or implied, are subject to the paramount authority of valid regulations issued by governmental agencies, as to well spacing patterns, proration orders, etc. Royalty owners' unitization agreements, similar to those entered into in the Cranfield and Brookhaven Fields of our state, likewise materially modify the implied covenants.[105]

Lessor's Remedies and Lessee's Penalties as to Non-Development

We now consider the subject of lessor's remedies and lessee's penalties for non-development of the lease. We now assume as a fact that lessee or assignee has not developed with reasonable diligence the leased premises, although it be true that there is an exploratory well on the premises producing oil or gas in paying quantities sufficient to carry the lease beyond the primary term. Let us concede that the "ordinarily prudent operator",

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[101]55 F.2d 634 (C.C.A. 5th 1932).
[102]Standard Oil Co. v. Giller, 183 Ark. 776, 38 S.W.2d 766 (1931).
[103]Worrell v. Parsons, 133 Okla. 61, 271 P. 155 (1928).
[104]*Supra* note 23.
[105]*Supra* note 24.

under the same or similar circumstances, could, under a valid spacing regulation, and would, having in mind the interests of lessor and lessee, have drilled an additional well or wells on the leased premises. We assume that there is no drainage by wells on adjoining lands, and further assume that there are no express provisions in the lease to cover the situation. The lessor, therefore, asks, "What can I do about it?" and likewise the lessee ponders the question, "What are the penalties for non-development, and how and under what circumstances are they administered?"

Damages

In all,[106] or practically all,[107] jurisdictions, the courts recognize the right of the lessor to recover damages for the breach of the implied covenant to develop with reasonable diligence. In Texas, since the decisions in *Grubb v. McAfee*[108] and *Waggoner Estate v. Sigler Oil Company*,[109] it is very clear that the implied covenants to develop reasonably the lease and protect it from drainage are covenants, and not conditions, and that the lessor's usual remedy for a breach of the covenant is an action for damages, "although under extraordinary circumstances—where there can be no other adequate relief—a court of equity will entertain an action to cancel the lease in whole or in part".[110]

The measure of damages for non-development in most jurisdictions is the value of lessor's royalty in the oil and gas which would have been produced had the lessee complied with the covenant to develop.[111] Definitely, the lessor is not entitled to more than his royalty, and cannot claim the entire hypothetical production.[112] In the absence of drainage, it has been suggested that since lessor will still be entitled to the royalty upon the oil when finally produced, the only damage he sustains is the loss of interest upon the royalty which he would have realized at an earlier date if the land had been properly developed. This view has been rejected in *Texas Pacific Coal and Oil Company v. Barker*.[113] Probable production may be established "by recognized methods", that is, testimony as to observed facts bearing on probable yield and expert testimony as to their effect,[114] although it has been held that expert testimony is not indispensable.[115] The remedy

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[106]MERRILL, *op. cit. supra* note 19, at 363.
[106]Pressler, *supra* note 9, at 411.
[108]109 Tex. 527, 212 S.W. 464 (1919).
[109]118 Tex. 509, 19 S.W.2d 27 (1929).
[110]*Ibid.*
[111]2 SUMMERS, *op. cit. supra* note 11, § 435.
[112]Warner v. Shell Petroleum Corp., 132 Kan. 837, 297 P. 682 (1931).
[113]117 Tex. 418, 6 S.W.2d 1031 (1938).
[114]Keenan v. Texas Production Co., 84 F.2d 826 (C.C.A. 10th 1936); MERRILL, *op. cit. supra* note 19, at 352.
[115]Powell v. Danciger Oil & Refining Co., 134 S.W.2d 493 (Tex. Civ. App. 1939).

of damages has been severely criticized, in its application to oil and gas problems,[116] because the problem of proof places too high a premium on so-called intelligent guesswork.

Cancellation of the Lease

A discussion of this penalty for non-development demands treatment of both the type, i. e., whether absolute or conditional, and the extent, i. e., whether in whole or in part, of the cancellation.

It has been noted above that Texas favors forfeiture or cancellation, in whole or in part, of the lease only when "extraordinary circumstances" are presented and the action of damages at law are inadequate. Even then, the later Texas cases are subscribing to the view that a decree of cancellation should only be conditional,[117] that is, the lease will be cancelled only if lessee does not drill additional well or wells within a certain period of time, which rule is also known as the "alternative decree," which has received its chief development in Kansas.[118] Courts of a number of the other states are to the same effect.[119]

Some forms of leases provide that, in case of cancellation or termination of the lease for any cause, lessee shall have the right to retain under its terms a certain number of acres, as ten, or twenty, around each well producing, worked on or drilling, such to be in the form of a square, as nearly as possible.[120] Still other forms provide that lessee shall have a certain number of days after final judicial determination that a breach has occurred within which to comply with the covenant. This provision has been struck down in the Texas case of *Frick-Reid Supply Company v. Meers,*[121] and has been said to be of doubtful validity in general.[122] Some forms provide that the only remedy for the breach of a covenant shall be an action for damages, and that no action for forfeiture can be maintained. Other forms stipulate that no action for damages shall lie, but only a suit for cancellation, with a proviso that lessee, in any event, shall be entitled to retain a certain number of acres around each drilling, producing or worked-on well. Producers 88—Revised—Mississippi—A has none of the provisions referred to in this paragraph.

As elsewhere shown in this article, the equity courts of Mississippi "abhor forfeitures", but generally so do courts administering equity powers

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[116]MERRILL, *op. cit. supra* note 19, at 352-359.
[117]1-A TEXAS JURISPRUDENCE § § 178 & 193.
[118]MERRILL, *op. cit. supra* note 19, at 378.
[119]*Id.* at 362-389.
[120]OAKES, BENOIT'S OIL AND GAS FORMS 98 (2d ed. 1939).
[121]52 S.W.2d 115 (Tex. Civ. App. 1932).
[122]Walker, *supra* note 13, at 305. *But see* MERRILL, *op. cit. supra* note 19, at 435-438.

in other states. Nevertheless, citations are many from the courts of other states, in early decisions, which hold that forfeiture of the lease, in whole or in part, is the proper remedy for the breach of the implied covenant to reasonably develop, either concurrently with the recovery of damages, or as an alternative to that remedy, depending upon the situation presented, or, in some cases, as the exclusive remedy.[123] Because forfeitures are abhorred, a number of these same courts hold that, where there has been a failure to develop or operate a part only of a tract, a partial cancellation might be granted, leaving to the lessee those portions which had been properly developed,[124] even though the lease did not provide that a certain number of acres around a producing well should be preserved to the lessee.

A study of the numerous recent cases from the various states shows that ordinarily an action for damages for breach of the covenant to develop is the only action that will lie, except in cases where this action is inadequate or in cases involving "extraordinary circumstances" or hardship; and even in these types of cases, only a conditional decree of cancellation as to the undeveloped part of the lease will lie, i. e., a decree will be entered by th court providing that, unless lessee within a certain time, as six months, a year, or so, drills one or more wells to the producing horizon in which the exploratory or other wells are drilled, on such undeveloped portion, the lease will be forfeited or cancelled as to said portion. A classic example of this later tendency is *Sauder v. Mid-Continent Petroleum Corporation,* decided by the United States Supreme Court in 1934.[125]

As to necessity of notice by lessor to lessee claiming a breach of the covenant to develop before a suit for damages or cancellation will lie, it would seem that no precedent notice would be necessary for an action for damages. There is a growing tendency in the courts to hold that such a notice of the breach, demanding development within a reasonable time, is a prerequisite to a cancellation suit.[126] In this respect, it is said: "Forfeiture is a harsh remedy which wipes out the lessee's interest", whereas "damages are drawn merely from the pocketbook."[127]

As to necessary parties plaintiff for such suits, it seems that any party claiming a royalty or mineral interest can bring an action for damages. For cancellation of the lease, however, the authorities over the country are di-

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[123]Brewster v. Lanyon Zinc Co., 140 F. 801 (C.C.A. 8th 1905); Ezell v. Oil Associates, 180 Ark. 802, 22 S.W.2d 1015 (1930); Bay State Petroleum Co. v. Penn Lumber Co., 121 Ky. 637, 87 S.W. 1102 (1905); Brown v. Producers' Oil Co., 134 La. 672, 64 So. 674 (1914); Fox Petroleum Co. v. Booker, 123 Okla. 276, 253 P. 1093 (1929); Cox v. Sinclair Gulf Oil Co., 265 S.W. 196 (Tex. Civ. App. 1924).

[124]Merrill, *op. cit. supra* note 19, at 363-364.

[125]292 U.S. 272 (1934).

[126]Merrill, *op. cit. supra* note 19, at 420.

[127]*Id.* at 421.

vided as to whether one co-tenant or co-owner can bring the action without the joinder of the others as parties plaintiff.[128]

In the Future

The complete absence of Mississippi decisions on the subject of non-development of the oil and gas lease has forced me to analyze the topic in the light of decisions from other states. Lack of precedent or applicable decisions in this State may foster a feeling of insecurity and uncertainty on the part of lessor and lessee as to the respective rights and remedies possessed by each. This lack of decision, however, has its compensations. The Supreme Court of our State is fortunate in having the benefit of the comparative wealth of decisions from other oil and gas producing states, which have been well tested by the trial and error, or empirical, method. Our Court, although ultimately having to fashion its own rules, can fortunately call to its aid the processes of selectivity and adaptation. We confidently believe that it will well perform its task.

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[128]*Id.* at 406-407; 2 Thornton (Willis), Oil and Gas 856-857 (5th ed. 1932).

THE DOCTRINE OF RECRIMINATION IN DIVORCE LAW

*J. W. Bunkley, Jr.**

A Social Problem

The marriage relation is no longer looked upon by society in quite the same light as it was in the days of the ecclesiastical courts of England. Whether from the spiritual view divorce be right or wrong, the fact is that ideas and morals have changed with time. Today it is recognized that in reality both the parties and the public are served to better advantage where the state will dissolve certain marriages; that the dissolution is to make for a healthier community, rather than to reward the innocent and punish the guilty. Is it not then utterly inconsistent and illogical to cling to recrimination[1] as a defense? If one party has a statutory ground for divorce from the bonds of matrimony, we will grant the decree of divorce. But if both parties have a ground for divorce, we will leave them shackled together, with the hope that in their mutual humility they will see their faults and will forgive, forget, and live together happily ever after. Who can be so naive as to foresee such a happy ending to the problem, when the parties themselves have felt it wise to publicly air through the courts their miserable plight?

By recognizing recrimination as a defense in bar to a suit for divorce, we not only are making divorce punitive in nature, but are irritating an already serious social problem. In many cases such an impossible and abnormal atmosphere will result in the raising of delinquent off-spring, and will place in the paths of the parties the temptation of illicit relations. Certainly parties who are condemned to so dark a future as would be the case where no divorce is granted will be highly susceptible to such temptation. What foundation there was for the application of this defense of recrimination has been washed away with the change in the outlook of society towards the indissolubility of the marriage. When the law is not in keeping with the change in spirit towards the very problem for which the law was made, then such law has lost its utility and should be destroyed.

The Illogical Dilemna

A total lack of understanding of the real problems which should be considered in deciding a case of this nature is exemplified in the case of

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[1]"Recrimination is a countercharge in a suit for divorce that the complainant has been guilty of an offense constituting a ground for divorce." Madden, Domestic Relations 305 (1931).

Dunn v. Dunn.[2] The complainant sought to divorce his wife on grounds of desertion and adultery. He alleged that four years after their marriage she deserted him without cause or justification and married another, and that he, being advised he could remarry, married another and lived with this second wife for eighteen years. A child and grandchildren were the fruit of his second union. The court in refusing relief held that the doctrine of recrimination was applicable. Although the husband had a ground for divorce, at the same time the wife had one because of his unwittingly having committed adultery. Decisions like this certainly justify any skepticism which laymen have in our system of justice. How could a more impracticable situation be created? To say the least, it would take a magician to untangle the lives of these parties. The only justification for the court's holding is that the parties were both to blame for their plight. It is admitted that the above case is an extreme example of the problem, but it clearly illustrates the pitfalls into which the courts will fall when they blindly follow certain "principles of law." It would seem to the writer that recrimination is not the logical result of reasoning, but instead the result has been reached arbitrarily, and the courts have set forth reasons which are merely a rationalization of this predetermined result.

A Misapplied Doctrine of Equity

The Mississippi Supreme Court has apparently rested its acceptance of the doctrine on the maxim that, "He who comes into equity must come with clean hands." The Court said in *Oberlin v. Oberlin*:[3]

> The rationale of the doctrine of recrimination is not its defensive efficacy against a complainant's charge but searches at once the status of the complainant as litigant. The state whose judicial servants administer its laws, is an interested party to the marriage contract, and one who comes into its courts complaining of a mote in the eye of his spouse must beware lest there appear a disfiguring beam in his own. His hands must be clean.

Historically the court of equity in England exercised no jurisdiction over the marriage status as such.[4] These matters were within the sole jurisdiction of the ecclasiastical courts.[5] The latter courts were not bound by the rules of equity, and its maxims were not applicable. The assumption in applying the clean hands principle is that the party has some *equitable interest to enforce,* and that relief will be denied by the chancellor where there is a showing that the complainant is not himself free from all wrong-

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[2]156 Miss. 132, 125 So. 562 (1930).
[3]201 Miss. 228, 29 So.2d 82 (1947).
[4]1 Pomeroy, Equity Jurisprudence § § 98, 112, 171 (1919).
[5]1 Holdsworth, History of England 614-624 (1922).

doing. It was recognized in England that in divorce actions no equitable interest was involved.[6] Prior to 1857 such matters were under the full control of the church courts, and were governed by the notions indulged in by that body. How then did many of the American courts allow this misapplication of an equity maxim to take root?

> In the United States, there were no eccesiastical courts, and the American Courts of equity did not regard themselves as having jurisdiction in divorce matters, until such jurisdiction was conferred by statutes. Many of the legislatures, following the English practice, passed special acts of divorce, and such acts were generally held to be constitutional, although they were attacked upon the ground that they impaired the obligation of contracts, and were an exercise of judicial power. But, though legislative divorces were constitutional, they were apparently unsound in principle, and Chancellor Kent, in his time, noted that the Constitutions of several states forbade legislative divorces, but recognized the power of the Legislature to confer divorce jurisdiction upon the courts.[7]

In Mississippi, legislative divorces are prohibited by the Constitution,[8] which confers jurisdiction over such matters on the chancery court.[9] The obvious reason why the equity courts have been vested with jurisdiction over matters in divorce is that these courts most resemble in spirit the ecclesiastical courts of England. It would not be unreasonable to assume that the draftsmen of the Constitution of Mississippi, recognizing that divorce was not historically a matter of equity, felt that without some constitutional provision there would be grave doubt as to which court would have jurisdiction over such matter. They specifically provided that the chancery court should have jurisdiction over all matters in equity, *and* divorce and alimony.[10] The legislature has stated specifically the sole causes for

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[6]"Its chief application [the maxim] came in cases where relief was sought by specific performance, rescission, because of fraud, or protection from an illegal contract. It certainly would have no application in England to cases not cognizable in equity, such as divorce, since in these cases no equitable interest was involved." Zacharias, *Recrimination in the Divorce Law of Illinois,* 14 CHI-KENT REV. 221 (1936).

[7]MADDEN and COMPTON, CASES ON DOMESTIC RELATIONS 170 (1940).

[8]MISS. CONST. § 90(a): "The legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.: (*a*) Granting divorces; . . ." (Sources: MISS. CONST. Art. VI, § 7 (1817); MISS. CONST. Art. VII, § 15 (1832); MISS. CONST. Art. IV, § 16 (1869).

[9]MISS. CONST. § 159: "The chancery court shall have full jurisdiction in the following matters and cases, viz.: . . . (*b*) Divorce and alimony; . . ." (Sources: MISS. CONST. AMEND. III (1832); MISS. CONST. Art. VI, § 16 (1869).

[10]MISS. CONST. § 159.

which divorce can be granted.[11] Thus the only enforceable right is of a purely statutory origin. It does not appear to the writer that there is any argument which will justify the position that the chancellor is conscience-bound to apply equitable rules to matters which are not equitable in substance, but instead are purely rights created by the legislature.

Assuming that the court is correct in treating divorce as subject to the maxims of equity, there is a well recognized exception to the clean-hands doctrine within which the writer believes divorce actions should fall. The Mississippi Court in the *Oberlin* case[12] recognized that where a divorce action is instituted the public has an interest at stake. When the public good will be promoted by the court's granting relief to one of two parties *in pari delicto,* such relief should not be denied.[13] Bishop in his monumental work, *Marriage and Divorce,* expressed most convincingly this view.[14]

Where not one of the parties alone but both of them have a ground for divorce, it would appear that for the best interest of the community, and that of any innocent children, the court could reach but one conclusion, that the public welfare would be served by granting the relief.[15] It is a mockery to our concept of the family as the foundation of society to consider the empty shell as a family unit. It is to ignore reality to argue that the public interest would be served by refusing relief, and that the parties would be more likely to reconcile their differences. No more fitting cir-

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[11]Miss. Code Ann. § 2735 (1942).

[12]Oberlin v. Oberlin, *supra* note 3.

[13]Darnell-Love Lumber Co. v. Wiggs, 144 Tenn. 113, 230 S.W. 391 (1921); Hermann v. Charlesworth, [1905] 2 K.B. 123; Roten, Adm'r v. Tesdell & Mackaman, 195 Iowa 1329, 192 N.W. 442 (1923).

[14]"Every state has an interest alike in the private morals, the public happiness, the general virtue, and the legitimate increase, of the community. Therefore a sound policy concurs with private right, in demanding the dissolution of marriages which have failed to accomplish substantially the ends for which they were created. By their dissolution, the state obtains the benefit of the fruits of such new alliance as the parties may choose to enter into, and sees the children trained under those better influences which harmony and matrimonial concord in the parents produce. This principle applies to desertion and other like offenses, which whether the divorce were allowed or not, would lead to the relinquishment of cohabitation; and to some other matrimonial difficulties, where the cohabitation would be continued, but with great discomfort and irritation. For children born during a discordant cohabitation have their natures tainted by it; while their education, in which also the state has the highest interest, must almost certainly not be of a salutary character." 1 Bishop, Marriage and Divorce 29 (4th ed. 1864).

[15]Taft, Criminology 140 (1947): "If divorce deprives the child of the loving care of one or both parents, it is, of course, a serious evil. But it has usually been the emotional tension preceding the divorce, or the necessity of taking sides with one parent, that has caused the damage to the child's personality. Possibly a society where incompatible parents may escape from the "bonds" of matrimony may, on the whole, be better for children than one where divorce is hard to obtain and in which life-long endurance of impossible marriage partners subjects the children to continuous emotional strain."

cumstances can be conceived under which this exception to the clean-hands maxim should be applied.

We have seen that this doctrine of recrimination was not the natural child of the time-worn maxim of equity, but that the Mississippi Court (as others) has applied that maxim to justify the doctrine. Where then is the real source of this often used defense? Tracing the history of divorce, we find that in the ancient literature of the Hebrews and the other early civilizations the husband quite readily and simply could obtain a divorce for adultery. There was no ground for which the wife could similarly gain her freedom.[16] Nor could she set up the adultery of her husband as a recriminatory measure. Likewise there was no evidence of the existence of recrimination in the family law of the early Roman civilization.[17] Marriage was based upon consent, and divorces were easily obtainable. Because mutuality of agreement as the basis of the marriage was so firmly engrained in the people of early Rome, Justinian was unable to successfully eradicate divorce by mutual agreement.[18]

Turning to the British Isles after the Norman Conquest, we find a close tie between the Roman Church and the state. Marriage was regarded by the former institution as a sacrament, and therefore indissoluble.[19] Blackstone stated that a total divorce could be granted for a canonical disability or impediment which existed before marriage, but not one arising afterward.[20] This of course was in its nature an annulment and not what we presently consider a divorce. The divorce *a mensa et thoro,* which Bishop describes as the most corrupting device ever imposed by serious natures on a blind and pliant community, began to be granted by ecclesiastical courts.[21] In order to obtain such a judicial separation, the complaining party had to prove that the other spouse was guilty of some gross misconduct such as adultery or cruelty, and establish that he, the complainant, was free from guilt. Such a divorce did not dissolve the union, but rather observed its continued existence, authorizing the separation of the parties.[22] The canon law respected the sacredness of the nuptial tie so greatly that it would not for any cause arising after the union of the parties permit its severance. This was the state of the law in England until the latter part of the seventeenth century, and origin of the doctrine of recrimination in the law of England.

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[16]Kourcek and Wigmore, Sources of Accident and Primitive Law 414-416 (1915); 1 Wigmore, A Panorama of the World's Legal Systems cc. I-III (1928).

[17]Beamer, *The Doctrine of Recrimination in Divorce Proceedings,* 10 Kan. City L. Rev. 216-220 (1941).

[18]Zacharias, *supra* note 6, at 218.

[19]Beamer, *supra* note 17, at 220-222.

[20]Blackstone, Commentaries of the Law 188, 189 (Gavit 1941).

[21]1 Bishop, *op. cit. supra* note 14, at 25.

[22]Blackstone, *op. cit. supra* note 20.

Marriage was indissoluble, but separations, or divorces *a mensa et thoro* were allowed. It was necessary to establish that the party complaining was innocent. It was not a bar to a divorce *a vinculo* because such divorce as we know it today was prohibited by the Church. From late in the seventeenth century down to the creation of the Court of Divorce and Matrimonial Causes in 1857, there were scattered cases where Parliament by special act granted absolute divorces.[23] This was purely a legislative matter, but there were few absolute divorces granted because of the expense and delay involved.[24] Because of this grievance, Parliament in 1857 established the above-mentioned court with jurisdiction over matters in divorce and power to grant absolute divorces.[25] Recrimination as a defense to bar an action is now in England left within the discretion of the judge.[26]

Let us now summarize the situation at the time we broke away from England. The divorce *a mensa et thoro* was permitted in the ecclesiastical courts; absolute divorce was allowed only for canonical disabilities existing at the time of the marriage. Recrimination was a defense to the former action. This defense was used not to prevent the separation but to protect the spouse against whom the action was brought from losing her right to enjoy the common property. Absolute divorce as we know it today was not known in the ecclesiastical courts. Such divorces were granted only by Parliament, and though recrimination was allowed to defeat the bill in some cases, it seems to have been a matter of discretion with the House of Lords. Since we do not have ecclesiastical courts, which are foreign to American principles, and since recrimination was established as a defense to an action entirely different from our present divorce, there seems to be no precedent for our having adopted this defense as a bar to our statutory divorce.

When the husband in the ecclesiastical court was granted a divorce *a mensa et thoro,* his wife lost her right to the common property, although retaining her right to dower upon his death and such other share in his personal property as she would have had but for the divorce.[27] This would mean in many cases that the wife would be thrown upon the community without means of support. This undoubtedly influenced the courts in refusing to grant to the husband a divorce from bed and board where he was partially at fault.

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[23] 1 HOLDSWORTH, *op. cit. supra* note 5, at 623, n. 4: "1669 Lord de Ross; 1692 Duke of Norfolk; . . . before 1715 only 5 such bills were known, between 1715 and 1775 there were 60. . . ."

[24] MADDEN, *op. cit. supra* note 1, at 259.

[25] *Id.* at 260.

[26] Zacharias, *supra* note 6, at 221-222.

[27] Beamer, *supra* note 17, at 225-235, 253.

Erring Spouse May Have Right to Alimony

Society today has changed in its attitude towards the woman and her total dependency upon her husband for support. By statute in Mississippi, married women are fully emancipated from all disabilities on account of coverture, and the common law disabilities are totally abrogated.[28] The property of the wife before marriage does not become their common property, and the wife has the capacity to make contracts and do anything in regard to property which she could do if not married. Marriage and divorce would therefore not affect her property. If she is without property, there is no reason why the court should not take this into consideration in granting the divorce, whether it grants it to both parties, as the writer advocates should be done, or grants it to one of the parties only. By statute it is left within the discretion of the chancellor, having regard for the circumstances and equities of the parties and the nature of the case, to make orders as to alimony.[29]

In *Winkler v. Winkler,*[30] the Mississippi Court held that where the divorce was granted to the husband, it was within the broad discretion of the chancellor whether the wife should be granted alimony. The court recognized the general rule that alimony should only follow a decree in favor of the wife, but stated that in view of the provisions of our statute,[31] the lower court could in proper cases decree alimony to the wife, even though the husband is granted the divorce. The general rule that alimony shall be decreed only when the wife gets a divorce has been made subject to several exceptions, which the court undoubtedly had in mind when it stated that there were "proper cases" where alimony could be granted the divorced wife. Among these are situations where the wife has contributed to the accumulation of the common property, and also where she is indigent or cannot earn a living, and therefore would be a public burden. In the *Winkler* case[32] the court said:

> It has been decided that a wife, though not entitled to a divorce, may have alimony when a divorce is decreed against her. *Coon v. Coon,* 26 Ind. 189; *Hedrick v. Hedrick,* 28 Ind. 291. The statute upon which the Indiana cases are based provides that "the court shall make such decree for alimony in all cases contemplated by this act as the circumstances of the case shall render just and proper." Our statute is as broad in its scope. In the case of *Graves v. Graves,* 108 Mass. 314, . . . the court in discussing the

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[28]Miss. Code Ann § 451 (1942).
[29]*Id.* § 2743.
[30]104 Miss. 1, 61 So. 1 (1913).
[31]See note 29 *supra.*
[32]See note 30 *supra.*

> subject said: "The question whether she or her husband was the guilty party is doubtless an element, and an important element, in determining whether alimony should be awarded to her, but it is not conclusive. She may have been guilty of such a breach of the marriage obligation as to entitle her husband to a divorce; and yet it may not be just, if her husband is comparatively rich or capable of earning money, and she is poor or weak, that she should be turned out into the world without any means of livelihood but her own exertions. The questions whether she should be allowed any alimony, and of the amount of such allowance, are, in every case falling within the enumeration of the statute, whether she is the party offending or the party injured, within the discretion of the court, upon a consideration of all the circumstances of the case. . . .

With the *Winkler* case and others in accord with it as authority, there would be no problem in regard to the support of the wife were a divorce granted where both parties were at fault.

Is Divorce for Only an Innocent Party?

The Mississippi statute does not mention the innocent party. It states that the injured party may be granted a divorce for any one of several causes. Where both parties are guilty of acts which are grounds for divorce from the other party, both parties have been injured, although neither is innocent. Our statute which enumerates the grounds for divorce manifests that it was not the intent of the legislature to make divorce punitive in nature. There certainly is no intent, for example, to punish a spouse who becomes insane after the marriage, yet the sane spouse can obtain a divorce from the insane.[33] This plainly indicates that the legislature was attempting to shape the grounds for divorce within the broad pattern of what would promote the public welfare and the best interests of the parties and the state.

It is not the writer's intention to advocate letting down of the bars and granting a divorce whenever a party becomes dissatisfied with his mate. Nor is it believed that the abolition of recrimination as a bar to an action would result in that. When one makes this defense he is not removing his own guilt or justifying his wrong. In effect he is saying, "Though you may have a ground for divorce, I have one also, and therefore you should be denied relief." The elimination of this plea would not result in granting a divorce where no cause exists, but instead would

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[33]Miss. Code Ann. § 2735(12) (1942).

recognize the added severity of the case and the urgent need for relief. Most divorce suits are uncontested, yet the failure of a marriage is seldom entirely the fault of one party. Where both of the spouses know that they are guilty of breaches of their marital vows and one of them is anxious to untie the union, that party will induce a compromise, if possible, whereby the court will never know the truth of the case. Where no such concealment of facts from the court is necessary in order to obtain relief, the truth will more readily be obtainable, and the court will be in a position to deal intelligently with the collateral matters of settlement. The temptation to practice collusion will not be so great.

The most convincing reason for abolishing the defense of recrimination is that the social problems are not solved but rather are increased by its use. We must recognize that there are definite social problems flowing from unhappy marriages, and that in many cases the parties and the public will be better off if the union is dissolved. Having recognized the existence of these problems, we create the incredible anomaly that when the problem is the most serious, no relief will be given. We defend this ridiculous situation by basing it upon a precedent which does not exist, or upon some equally inapplicable reasoning. We have progressed a long way in dealing sociologically with such problems. The next step should be to abolish the defense of recrimination.

A Suggested Solution

The best solution to the problem would be to grant both parties a divorce where each makes out a cause for divorce. It is believed that the court could reach this result under our present divorce statutes without any repeal or amendment of them. However, because of the deep roots which the doctrine of recrimination has embedded into the legal thinking of the judiciary, it is highly unlikely that such result would be attained. Therefore it is suggested that Section 2735 of the Mississippi Code of 1942 be amended to read, "Divorces from the bonds of matrimony may be decreed when either or both parties to the marriage show any one or more of the following causes. . . ." Section 2743 would not seem to require any amending to accord with this proposed change. When a divorce would be granted under this suggested amendment and both parties are at fault, the chancellor would consider the comparative rectitude of the parties as a basis for determining alimony, custody of the children, and any other collateral problems which might arise.

State Bar Section

The following articles by members of the Mississippi State Bar represent contributions not written specifically for publication in the *Mississippi Law Journal* but which, because of their special interest to Mississippi lawyers, are published here. In accordance with its policy of seeking to encourage writing on legal matters by members of the Bar, the *Journal* will welcome an opportunity to publish any items of sufficient and general interest.

STATES' RIGHTS UNDER THE FEDERAL CONSTITUTION*

Malcolm B. Montgomery†

The struggle to maintain the Constitution of the United States is an unending one. The battle is always on, although the fact be little appreciated. The old saying, "Eternal vigilance is the price of liberty," is more than a meaningless platitude.

To the superficial observer, it would seem that the Constitution was never more strongly entrenched in the affections of the American people. In a sense this is true. If the Constitution were submitted tomorrow as an entirety to a referendum, it would be re-adopted by a majority so preponderating as to approach unanimity.

This would not be due to any widespread knowledge on the part of the people of their Constitution, its historic background, or its essential political philosophy, but rather to the fact that the word, "constitution," conveys to the citizens the consciousness of the organic unity of the constituent states, and few, if any, question the immeasurable benefits which have resulted from the "Union", a name applied to the American Commonwealth long before its present form.

The real danger to the Constitution lies in the gradual erosion of its principles, as from time to time, in the stress of real or fancied, but passing, emergencies, some of these principles are so ignored that they cease to be of vital force.

Washington recognized this in his "Farewell Address" when he prophesied that our form of government would be much more easily undermined from within than overthrown by outward attack.

To the thoughtful American, the Constitution is not unlike the sandy beach of an ocean front. The encroaching waves ebb and flow each day. At high tide there is less beach and at low tide more. At times the beach

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*Address at a meeting of the Hinds County Bar Association in Jackson, Miss., January 31, 1949.

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will be devoured by the ocean, when a tempest has lashed it into a fury, and then the waters will become as placid as a mountain lake, and the shore will seem to have triumphed in the age-old struggle between land and water.

The owner of the upland is often deceived by the belief that the fluctuations of the battle generally leave the shore line intact, but when he considers the results of years, and not months, he will realize that the shore line has gradually lost in the struggle, and that slowly but steadily, the ocean is eating into the land.

This is true of the erosion of our government. Unhappily a written form of government is not a Gibraltar that can resist the waves piled up by any and every gale that blows, but it is a sandy beach, which, while it seems to beat back the devouring waters, is always losing in the struggle. Each decade sees some principle of the Constitution either weakened or nullified, and the difficulty is that the people are only sensible of their peril after the principle is destroyed, and when it is too late to restore it.

At the present time a storm is raging. There are those who feel that our founding fathers were not wise in writing into our Constitution that perfectly defined balance of the powers to be exercised respectively by the national government and the state government; that too little power was given to the national government and too much power was given by our Constitution to the state, and they would change this balance. The waves, lashed to a hitherto unknown fury by the raging storm, completely cover the sandy beach of the shoreline and now run high upon the uplands reaching areas hitherto untouched. God forbid that, when this storm abates, there will be a gaping and yawning hole in our coast line, from which our honored and cherished principles of states' rights have been removed and carried out to sea forever. If so, the people of this nation will then discover it and regret it, but it will then be too late to restore it.

In the system recognized by the Constitution, the nation and the states are mutually dependent upon each other and are very closely related. The two together form a whole—each by itself an incomplete part. While they have concurrent powers over certain subjects, as a rule the powers are mutually exclusive. The separation of the state and national governments is accomplished by delegating certain powers to the United States Government and prohibiting some of those and some others to the states. Within its own sphere each is supreme; but in case they overlap and the two come into conflict, precedence is given to the United States by virtue of the provisions that the Constitution, the national laws made in agreement with the same, and the treaties should be the supreme law of the land. The dependence of the nation on the states is shown not only in the need of

state law to supplement national law, but in the method of election of many of its officials. By refusal to enact certain necessary laws the states might interfere with, or even prevent, the election of senators, representatives, and presidential electors.

The Constitution attempts to grant the central government all powers that the states could not satisfactorily exercise, because united action is necessary. From the nature of the case, these powers conferred by the Constitution on the United States Government were considered to be delegated to it by the states, and in order to properly limit such powers, they were expressly, by and in the Constitution, enumerated. All other powers were expressly left in the states.

All powers provided in the Constitution of the United States fall into five classes: (1) those delegated by the states exclusively to the national government, (2) those reserved exclusively to the states, (3) those powers exercised by either the nation or the states, usually called concurrent, (4) powers denied to the national government by the Constitution, and (5) powers denied to the states by the Constitution.

The sphere of the national government, in consequence, includes both exclusive and concurrent powers. These powers, of course, were delegated by the states, but delegated powers may be either expressed or implied, and no one nowadays denies that the United States Government has the right to supplement the powers expressly stated in the Constitution, by such means as are reasonable and wise to carry out these powers. That is, we are, in practice, broad constructionists of the phrase that Congress has the power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."[1]

Nevertheless, it is generally admitted that the United States does not have exclusive powers, unless the Constitution expressly states that the power granted to the United States Government is exclusive, or unless a power given the United States Government is, at the same time, denied to the states, or unless, from the very nature of the power, it could be exercised by both the nation and the states. The powers are concurrent if they are simply granted to the United States without being denied to the states.

While the states are excluded, either by express prohibition or by implication, from the greater part of national affairs, under our Constitution,

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[1]U.S. CONST. Art I, § 8.

they control all other subjects of government except those denied to all governments and consequently reserved to the people. Lest there should be doubt on that point in any one's mind, the Tenth Amendment says, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people". In this Amendment we find the means of determining whether a power is rightfully exercised by the state, and this is done, very easily, by finding out what powers have, by the Constitution, been surrendered by the states. If the Constitution delegates the exclusive power to the federal government, or if the power is prohibited to the state, by the Constitution, then the state cannot exercise that power. All other powers belong to the state and in the exercise of those powers the state is supreme.

This field in which the state is supreme is one of great importance, not only from the variety of subjects included, but from their personal relationship to the individual. Practically all matters belonging to the criminal and to the private law are regulated by the states, including laws regarding property and the business and personal relations of one individual to another.

The state has complete charge of all local government, of education, of the elective franchise, of most corporations, police duties, civil rights, marriage and divorce, the poorer and delinquent classes, and public health. It is constantly brought in close touch with the individual. Legislation on these subjects, and the administration of the laws made upon them, is exclusively within the province of the state and the control of the state over all of them is exclusive and absolute.

Prohibitions have been placed by the Constitution of the United States upon the state and national governments of this country for three separate purposes: (1) to prevent all action by any government, state or national, on certain subjects; (2) to protect the states or individuals from interference by the national government; and (3) to keep the states from infringing upon the powers given to the central government and demanding concurrent action. The first object is attained by prohibiting both to the national and state governments the granting of titles of nobility, the passing of bills of attainder, and ex post facto laws or laws recognizing slavery. Neither the state nor the national government can legislate regarding any of these matters. The second object is attained by direct prohibitions or limitations upon the United States Government and the third is attained by prohibitions upon the states in the national Constitution.

The sphere of activity from which all governments are excluded could be further enlarged by uniform action among the states. If, for instance, a certain subject belongs exclusively to the states and all state constitutions

were made to agree in prohibiting legislation on that subject, that subject would then be as much outside the control of government as is the granting of titles of nobility. The Constitution of the United States, as construed by decisions of the Supreme Court of the United States, placed the entire domain of civil rights within the exclusive powers of the states and wholly without and beyond any powers conferred by the Constitution on the national government. This is the clear pronouncement of the court in the *Slaughter-House Cases*[2] and in the *Civil Rights Cases*.[3] This being true, if there were a provision in each of the state constitutions, prohibiting legislation on civil rights, then that subject would be wholly outside the control of both the state and national governments, as is the granting of titles of nobility. The legislatures of the various states would then not even have the power to ratify an amendment to the Constitution, if any such amendment were proposed delegating such power to the national government.

While the spheres of the national and state governments overlap in some particulars, on the whole they deal with essentially different and mutually exclusive fields of activity. The state government is supreme within most of its sphere, the national government is supreme within all of its sphere, and yet neither is supreme in the sense that it is fully and entirely sovereign. Each is an agent carrying out the will of the real sovereign—the people of the United States. As each does certain things for the sovereign, the people, that the other cannot do, neither can exist by itself. They are mutually dependent. This interdependence is shown in many ways. As just mentioned the work of the whole of government can be accomplished by neither government alone. On account of the difference in the task set each, one cannot become subordinate to the other, *i. e.,* the national government cannot become the agent of the states, nor the states mere administrative subdivisions of the nation, with their governments under the control of the central government, without completely destroying the federal state, composed of state and national governments, as set up by the Constitution.

The national government makes use of the states, or of the state government, in the choice of many of its important officers, especially its senators, congressmen, and presidential electors, and the states may prevent the election of these officials and could, by concerted action, make the organization of the national government impossible. But the bare fact that even in the critical period of our history this has never been done, rather shows an actual dependence of the state upon the nation.

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[2]83 U.S. 394 (1873).
[3]109 U.S. 3 (1883).

The interdependence of the state and national governments, with the lack of subordination of one to the other, is apparent when we consider that each acts upon individuals, and does not use the machinery of the other. For example, if an individual infringes upon state law, he is punished directly by agents of the state. If he violates national law, the national government does not call in state aid, but looks after the matter itself. In the same way national taxes are collected by national officials, state taxes by administrative agents of the state. So the national government and the system of state governments is each complete in itself for certain purposes, but incomplete without the other for the great purpose it serves—the whole government of the people.

Citizenship

Since the individual is subject to the state government in certain matters, and has certain rights guarded by that government, while he has different rights and obligations under the national government, it is customary to speak of the dual character of his citizenship. He is said to be a citizen of the United States, and also a citizen of a state.

There has been, during our history, a great deal of controversy over this subject of citizenship. Those who held that the states were sovereign, and that the Constitution was a compact, claimed that citizenship was only of the state; that there could not be such a thing as citizenship of the United States, and that the term, "citizen of the United States," which occurred in the Constitution, was merely a convenient way of speaking of a citizen. The other class held that there was a citizenship of the United States distinct from citizenship of the state; but for three-quarters of a century it never succeeded, judicially or otherwise, in clearly defining its position.

Before the Civil War there can be no doubt that the vast majority of the people held the state citizenship to be above that of the United States, if, in fact, they admitted there was such a thing as citizenship of the United States. When confronted by the necessity of choosing between the citizenship of the state government and the national government, history furnishes us with the record of that great American, Robert E. Lee, resigning his commission in the national army to take his place with the troops of his native state, Virginia. History also gives us the record of that great Mississippian, Jefferson Davis, standing on the floor of the national Congress, telling the world of the relationship under the Constitution between the state and the national government and the powers of each, and then leaving the Congress to return to his beloved state to render in full measure his duties as a citizen of this state.

After the Civil War, the reconstruction period led Congress to pro-

pose a constitutional amendment, whose purpose was to recognize the freedmen as citizens. The Fourteenth Amendment was proposed and adopted.[4] This Amendment no longer left any doubt about the dual character of citizenship, and the Amendment shows that United States citizenship is now no less important than state citizenship. But what were the "privileges and immunities of citizens of the United States" which the states were forbidden to abridge? Did they include everything embraced in the Civil Rights Bill of 1866, or was the object of the Amendment merely to place beyond doubt the reality of United States citizenship and not to increase the powers of the national government over civil rights. It was a momentous question affecting the very nature of federalism and the integrity of the states as such, for if the national sphere was to be so greatly enlarged, the balance between the nation and the states could hardly be longer maintained. The authoritative interpretation of the first sections of the Amendmen was given by the Supreme Court of the United States in the *Slaughter-House Cases*,[5] wherein it was determined that before the Fourteenth Amendment "the entire domain of the privileges and immunities of citizens of the states lay within the constitutional and legislative power of the states and without that of the federal government and that the power of the Congress had not been increased by the amendment." This decision has never been overruled.

Franchise

The franchise is not a right of citizenship. The right to vote is a political privilege conferred by a state upon such of its members as it deems fit to exercise such a privilege. Voters and citizens are not the same. The Constitution of the United States guarantees the protection only of rights, *i. e.* (1) personal rights and (2) property rights. The only personal rights guaranteed are his rights as a citizen of the United States, which are guaranteed by the Fourteenth Amendment, and the right to vote is not a right to be exercised under the Constitution by all citizens of the United States, but under the Constitution the power to regulate the right of franchise is within the powers reserved to the states by the Tenth Amendment.

Good government is impossible without intelligence on the part of the voting population. Tests of educational fitness have been applied in a

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[4]Section 1 of that Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[5]*Supra* note 2.

constantly increasing number of states. Connecticut led the way in 1855 by insisting upon ability to read and write.[6] Massachusetts followed, two years later, by barring those who could not read or write in English.[7] Her example has been followed by California, Maine, Wyoming, Delaware and Connecticut. Mississippi in 1890 provided that if a man could neither read the Constitution nor understand it when read, he could not vote.[8] In *Williams v. Mississippi*[9] the Supreme Court of the United States held this to be a lawful exercise of the power reserved to the state under the Tenth Amendment. South Carolina, five years later, adopted the Mississippi method but did not deprive those who owned property assessed for at least $300.00, even when they were not intellectually qualified.[10] Louisiana[11] in 1908 and Alabama[12] in 1901 embodied in their Constitutions provisions similar to those of South Carolina. Georgia did the same in 1908.[13] North Carolina in 1900 and Virginia[14] in 1902 excluded those who could not read or write in English. The educational test, though far from perfect, is one of the best yet devised and up to now it has been uniformly accepted by all as being within the exclusive power of the states as established in the national Constitution. Within the last ninety days the Supreme Court of the United States has declined to act in connection with state elections on the ground that their control is an exclusive right of the state.

Voting is not a legal right guaranteed by the national Constitution. For emphasis let me repeat that it is merely a political privilege and the state, under the national Constitution, has the absolute right to confer it upon only such members as it deems fit to exercise such a privilege, so long as it does not discriminate because of race, color, or previous condition of servitude, which limitation exists against any and all laws of every character that may be passed by a state legislature.

I have attempted to show, in this brief talk, the close and interdependent relationship existing between the state and the national government. In using the term, "Federal State," there is included the joint operation of the state governments of all of the states and the national government. The people are the sovereigns. The Constitution vests in the national government those powers that could not be conveniently handled by the state,

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[6]Conn. Const. Amend. XI.
[7]Mass. Const. Amend. XX.
[8]Miss. Const. Art. 12, § 244.
[9]170 U.S. 213 (1898).
[10]S.C. Const. Art. 2, § 4.
[11]This provision is embodied in the Louisiana Constitution of 1921. La. Const. Art. VIII, § 1.
[12]Ala. Const. Art. 8, § 181.
[13]The new Georgia Constitution of 1945 contained virtually the same requirements. Ga. Const. Art. II, § 1.
[14]Va. Const. Art. II, § 20.

and there was reserved in the state all other power to represent the sovereign, the people.

In establishing this Constitution, the makers did not break with the past. It is accepted by all that the Constitution is the product of the historical experience of the race and that the great merit of the convention was that it did not try to create anything, but adopted institutions already existing to suit the conditions. We all know that there is scarcely a feature of either the national Constitution or of the national government that cannot be traced to earlier American institutions, while direct conscious limitation of the English system of 1787 played a very small part in the work of the convention. As a result there has been established a Federal State that is the marvel of the world. Our Constitution has fostered the energy and enterprise of its citizens to such an extent that it has lifted thirteen struggling colonies into a nation of more than 150,000,000 people in just 162 years. When our nation's first census was taken in 1790 the population of this nation was only 3,929,214 souls. Now, more than that number are employed as civilians to run the machinery of our Government. During the last World War we mobilized an army of more than 12,000,000 men, three times as many as the whole population of the nation just 158 years ago.

The makers of our Constitution wrought well. In it they embodied the historical experience of the past. By example they admonish us not to break with tradition but to adapt the institutions of history to our needs. Their admonitions recall the admonition of the Apostle Paul, "Whatsoever things are true, whatsoever things are honest, whatsoever things are just, whatsoever things are pure, whatsoever things are lovely, whatsoever things are of good report, if there be any virtue, and if there be any praise, think on these things."

If we tamper with the rights of the states, the delicate balance of the Federal State will lose its delicate adjustment. We will court disaster and it is quite possible that our efforts will result in burning down our house in a supposed attempt to get rid of the rats.

The storm is raging. Our constitutional shoreline is piled high with the waves that have been lashed by the fury of the storm. With hearts full of gratitude for the past accomplishments of this nation under the Constitution, and with pride in the land that gave us birth, let us press ever onward to a higher plane of civic duty in this crisis, remembering always that, "Eternal vigilance is the price of liberty."

THE LAW OF CULPABLE NEGLIGENCE IN MANSLAUGHTER CASES RESULTING FROM OPERATION OF MOTOR VEHICLES

*Earl L. Wingo**

The introduction of automobiles as a means of conveyance upon our public streets and highways, together with the constant increase in their use, has led to a rapid accumulation of judicial decisions pertaining to their operation.

It is only natural, therefore, to observe a flood of legislation relating to speed at which motor vehicles may be operated, as well as numerous other statutory requirements for the insurance of safety in their operation, and the protection of property and human life.

It is now the well established law, by the great weight of authority, that an automobile is not inherently a dangerous agency, so as to render the owner or operator thereof liable as an insurer for injuries caused thereby. Liability, both civil and criminal, if any, must rest upon alleged negligence. The rules requiring extraordinary care of dangerous instrumentalities do not apply to motor vehicles. In other words, automobiles are not regarded in the same category with locomotives, ferocious animals, dynamite, and other dangerous contrivances and agencies.

Although it was a crime at common law to cause the death of, or injury to, a human being by doing a lawful act without the exercise of the proper degree of care to avoid the danger of injury to another, or by doing an unlawful act, yet, in view of the frequency of tragedies in connection with the operation of motor vehicles, legislation upon the subject has been deemed desirable and essential, and now the crime is generally defined and made punishable by statute, ordinarily as "manslaughter."

The vast amount of litigation that the automobile has sponsored, and the variety of common law doctrines it has involved, have become sufficiently numerous to form a distinct branch of our law. This article, however, will be limited to a review of the Mississippi Supreme Court decisions pertaining to its varied definitions of the phrase, "culpable negligence," in cases where death resulted from the operation of motor vehicles.

There is no special statute in Mississippi dealing specifically with the alleged crime of manslaughter resulting from the operation of a motor vehicle. All prosecutions in such instances are, therefore, based upon

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Section 2232 of the Mississippi Code of 1942, which is in the following language: "Every other killing of a human being by the act, procurement or culpable negligence of another, and without authority of law, not provided for in this chapter, shall be manslaughter."

Section 2454 of the Mississippi Code of 1942, on the question of what is required as to the language in an indictment, involving the crime of manslaughter, is as follows: "And it shall be sufficient in an indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased, concluding in all cases as required by the Constitution."

In the case of *Williams v. State*,[1] the Mississippi Supreme Court, in construing the sufficiency of an indictment under Section 2454, held that the use of the word "wilful" in the allegations did not render the indictment demurrable. The Court was of the opinion that the word could be treated as mere surplusage, and that in any event its only effect was "to charge the appellant with intentionally doing the thing which constitutes his culpable negligence, but not with the intention of inflicting the injury resulting therefrom."

In the later case of *Cutshall v. State*,[2] the Court held as follows:

> The indictment within the statutory form of manslaughter, charging that the defendant unlawfully and feloniously did kill and slay one Spangler Gleason, a human being—this was sufficient. Culpable negligence was at once the basis of the prosecution and the gauge as to the evidence.

We now come to a consideration of what would be a proper definition of "culpable negligence," by reason of the operation of an automobile and in consequence of which a homicide resulted.

It will be interesting to observe that the Mississippi Supreme Court, in several of the earlier cases, approved, but later expressly disapproved, its definition of that which constitutes culpable negligence in such cases.

The first case on this subject is that of *Sims v. State*,[3] wherein the Court, while pointing out that culpable negligence must be determined from the facts of the individual case and that there is no universal rule which can be applied, approved the following definition from *Words and Phrases*[4] as a general guide:

> The omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such

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[1] 161 Miss. 406, 137 So. 106 (1931).
[2] 191 Miss. 764, 4 So.2d 289 (1941).
[3] 149 Miss. 171, 115 So. 217 (1928).
[4] 1 WORDS AND PHRASES 1174 (2d series).

a man would not do, under the circumstances surrounding the particular case.

This decision represents the first time that our Supreme Court undertook to define the phrase "culpable negligence" in a homicide case resulting from the operation of a motor vehicle.

In the subsequent case of *Gregory v. State,*[5] the Court again had before it the question of a proper defniition of "culpable negligence." In this case an enlargement was made upon the prior definition set forth in the *Sims* case. The Court used the following language:

> Criminality cannot be predicated upon mere negligence or carelessness, but it has been said that it may be predicated upon "that degree of negligence or carelessness which is denominated as gross, and which constitutes such a departure from what would be the conduct of an ordinarily careful and prudent man, under the same circumstances, as to furnish evidence of indifference to consequences."

The question arose once more in the case of *Robertson v. State,*[6] and the Court approved the definitions of culpable negligence that it had advanced in the *Sims* and *Gregory* cases.

The next case submitted to the Supreme Court was that of *Shows v. State,*[7] in which the defendant had been charged with, tried, and found guilty of the crime of manslaughter, growing out of the operation of a motor truck, by reason of the alleged culpable negligence of the driver. During the trial in the circuit court, the State was granted an instruction which defined "culpable negligence" in the identical words used in the *Words and Phrases* definition, quoted above, and cited with approval by the Court in the *Sims* case. On appeal the Supreme Court repudiated that definition as being improper in that simple negligence could come within its scope. The Court then concluded that the definition quoted above from the *Gregory* case "constitutes the law applicable to the degree of negligence required to make a case of culpable negligence in a criminal prosecution."[8]

Following the announcements set forth in the *Shows* case, we find the Supreme Court continuing to approve the definition of culpable negligence first enunciated in the *Gregory* case.[9] The cases of *Turner v. State*[10] and *Scott v. State*[11] used the identical terms quoted above.

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[5]152 Miss. 133, 118 So. 906 (1928).
[6]153 Miss. 770, 121 So. 492 (1928).
[7]175 Miss. 604, 168 So. 862 (1936).
[8]*Ibid.*
[9]*Supra* note 5.
[10]183 Miss. 658, 183 So. 522 (1938).
[11]183 Miss. 788, 185 So. 195 (1938).

The *Scott* case was decided in 1938 and seemed to settle the law on the question, for there elapsed a period of seven years before the Supreme Court handed down a written opinion setting forth that which would constitute a sufficient and legal definition of the phrase "culpable negligence." On January 22, 1945, however, the Court rendered an opinion in *Smith v. State*,[12] in which it withdrew all of its former opinions wherein it had theretofore sought to define "culpable negligence," holding that all such previous definitions were wholly insufficient.

The lower court's instruction to the jury as to the definition of culpable negligence was couched in the same terms as those of the *Gregory* case. In passing upon the question of the sufficiency of the definition, the Supreme Court had this to say:

> While it was not necessary to either allege or prove that the killing was "wilfully" done, within the strict meaning and common acceptation of that term, it was, nevertheless, incumbent upon the state in this character of case to prove beyond a reasonable doubt that the act of the defendant was unlawful and felonious; that is to say, that he was guilty of such gross negligence on the occasion complained of as to evince on his part a wanton or reckless disregard for the safety of human life, or such an indifference to the consequences of his act under the surrounding circumstances as to render his conduct tantamount to wilfullness.[13]

The Court went on to say further that:

> . . . the term culpable negligence should be construed to mean a negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be a negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life. . . .[14]

Two cases[15] have been decided since the rendition of the opinion in the *Smith* case, and in both of them the Court has reaffirmed the stand which it took in that decision.

It can now be stated that the sound reasoning announced in that case is in line with the great weight of authority. Moreover, we now have a definite expression from the Supreme Court giving to the bench and bar of the state a workable guide in the drafting of a proper instruction to the jury defining the term, "culpable negligence." The following is the last expression on the subject:

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[12]197 Miss. 802, 20 So.2d 701 (1945).
[13]*Ibid.*
[14]*Ibid.*
[15]Gardner v. State, 23 So.2d 925 (Miss. 1945); Reynolds v. State, 199 Miss. 409, 24 So.2d 781 (1946).

"Culpable negligence" is defined to be a negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life.

"Culpable negligence" is defined to be the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as the result of a wilful creation of an unreasonable risk thereof.[16]

"AND/OR"—A SELF-DESTROYING SYMBOL*

B. B. Allen†

During the past generation there has sprung up the senseless phrase, "and/or", which is coming into general use not only by lawyers but by laymen as well. Its origin is shrouded in obscurity, and its growth is wholly unwarranted. Its effect is to create confusion and uncertainty wherever it appears; its meaning is vague and conflicting. It is the indefensible hyphenation of the conjunctive and disjunctive use of two simple words of opposite meaning, the one nullifying the effect and meaning of the other. It has thrown into meaningless speculation that which should be clear and unambiguous. Stirred by doubt and uncertainty in the minds of its users as to which word to employ, it has found its way into contracts and statutes to confound the courts and those who attempt to arrive at its meaning.

The *American Bar Association Journal* had several articles on it some years ago, condemning this practice; but it would appear that its warning went unheeded.[1] Realizing the evils inherent in the growing use of this abortive phrase or symbol, I am presuming to call it to the attention of the bar in the hope of enlisting aid in putting a stop to a practice that has confused the courts of this and other states where this symbol has come under consideration. If the parties themselves are in doubt as to what they mean, can it be said that there was ever a meeting of the minds in a contract? Can it be said that the parties have a right to ask the courts to declare by guess-work just what they meant, when they themselves did not know?

If I say "John and I" will do a thing, then I mean that both of us will undertake to do it; and if I say "John or I" will do it, then I mean that one of us will undertake to do it. But when I say "John and/or I" will do a thing, then neither I nor anyone else will know what I am talking

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[16]*Supra* note 12.

*Excerpts from an address at the annual banquet of the Sunflower County Bar Association in Indianola, Miss., February 20, 1948.

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[1]Editorials, 18 A.B.A.J. 456 & 524 (1932); Letters, 18 A.B.A.J. 574 (1932).

about, nor who will do anything. In other words, this symbol throws doubt, confusion and uncertainty into any situation, contract or statute that it enters. It is equivalent to the Shakespearean phrase, "To be or not to be."

One of the early cases on this point is *Tarjan v. National Surety Company,*[2] and since it is referred to with approval in later cases, I quote from this opinion:

> The second and third finding of fact and the third, fourth, fifth and sixth propositions of law submitted contained the symbol "and/or" eight times. We condemned the use of this freakish fad in *Preble v. Architectural Iron Workers' Union,* 260 Ill. App. 435. That we are right in our conclusion in this respect is seen by reference to the July, August, and September numbers of the American Bar Association Journal, pp. 456, 524, and 574, respectively.
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> In the July number the editor in chief, Major Edgar B. Tolman . . . said: "With regret we are compelled to note that even Congress has fallen into the use of this accuracy-destroying symbol.
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> "The use of this symbol arises in part from a doubt as to which of the two words should be used. Is it any solution of this doubt to leave the question to be solved by construction at a later time?
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> . . . In short, we believe the symbol to be a device for the encouragement of mental laziness even in the drafting of private contracts. . . ."

The opinion then concludes by striking down a document with this phrase in it as being meaningless.

The Mississippi Supreme Court in *Gully v. Jackson International Company*[3] followed and approved the *Tarjan* case. But in a beer election case, *Costas v. Board of Supervisors,*[4] it failed to strike down an election where the notice of it contained this symbol, because the voters were not misled by it. However, in an able dissenting opinion by Judge Roberds, we find what appears to be the position of a majority of the courts in the land: "With the conjunctive-disjunctive combination of 'and/or' following some and preceding other propositions no voter could know for which or against which proposition he was voting." And again in *Thompson v. Commonwealth Life Insurance Company,*[5] the Court read out of the symbol the word "or" and made it read only "and". In the lights of these announcements, it would appear that Mississippi courts do not approve this

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[2]268 Ill. App. 232 (1932).
[3]165 Miss. 103, 145 So. 905 (1933).
[4]196 Miss. 104, 15 So.2d 365 (1943).
[5]198 Miss. 515, 23 So.2d 539 (1945).

slothful habit, but are critical of it. How much easier it would have been in the first instance for the parties to say what they wanted, and not ask the court to read their so-called minds.

Most courts hold that the symbol is subject to condemnation as being confusing and misleading.[6] I have cited only a relatively small portion of the late cases dealing with this symbol, but there appears to be unanimity among the decisions as to the lack of meaning of this phrase. However, I do not think I should close this discussion without quoting the following amusing comment by the Supreme Court of Illinois:[7]

> We hoped it would not be necessary to again refer to the use of such symbols by the legal profession in this district. In the order appointing the Chicago Title & Trust Company, a corporation, receiver, we find in tiresome and vain repetitions these further abominations: "it/he", "its/his", "it/him", all worthy of barbarian genesis. In view of the fact that the receiver was a corporation, the use of "he", "his", and "him" indicate a confusion of thought not to be tolerated. And/or, was/were, is/are, it/he, its/his, it/him—so do bad habits grow.

Whenever documents have appeared in the courts containing this symbol, it has given deep concern; some of them have undertaken by construction to declare just what was in the minds of the parties using them, while others, being unwilling to delve into the realm of psychiatry, have struck them down as meaningless. All of the courts appear to be in harmony in frowning on this phrase, and in most cases have rejected it as meaningless and impossible of intelligent construction. They are unwilling to say with certainty what the parties themselves could not make up their minds to say.

I believe that when the lawyers of this country come to understand the evils of this self-destroying symbol, they will join in a crusade to eliminate its use in the English language.

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[6]American General Ins. Co. v. Webster, 118 S.W.2d 1082 (Tex. Civ. App. 1938); Drummond v. Columbus, 136 Neb. 87, 285 N.W. 109 (1939); State v. Jefferson, 19 N.J. Misc. 678, 23 A.2d 406 (1941); Adler v. Douglas, 339 Mo. 187, 95 S.W.2d 1179 (1936); State v. Dudley, 159 La. 872, 106 So. 364 (1925); *Ex parte* Bell, 19 Cal. 488, 122 P.2d 22 (1942); Barron G. Collier, Inc. v. Connelley, 134 Tex. 569, 137 S.W.2d 14 (1940); Cochrane v. Florida East Coast Ry., 107 Fla. 431, 145 So. 217 (1932); Russell v. Empire Storage & Ice Co., 332 Mo. 707, 59 S.W.2d 1061 (1933); Kuttner v. Swanson, 59 Ga. App. 818, 2 S.E.2d 230 (1939); McPherrin v. Hartford Ins. Co., 44 F.Supp. 674 (N.D. Cal. 1942); Wichita Falls & Southern R. R. v. Lindley, 143 S.W.2d 428 (Tex. Civ. App. 1940); Gurein v. State, 209 Ark. 1082, 193 S.W.2d 997 (1946); Lee v. Douglas Gibbons & Co., 258 App. Div. 717, 14 N.Y. Supp.2d 938 (1939); Clay County Abstract Co. v. McKay, 226 Ala. 394, 147 So. 407 (1933); Eysink v. Board of Supervisors, 229 Iowa 1240, 296 N.W. 376 (1941); State v. Mitchell, 217 N.C. 244, 7 S.E.2d 567 (1940); *Ex parte* Iratacable, 55 Nev. 263, 30 P.2d 284 (1934); Weinberger Banana Co. v. Phoenix Assurance Co., 74 F.2d 539 (C.C.A. 5th 1935); Elliott v. Agajanian, 19 Cal. App.2d 244, 64 P.2d 1159 (1937); Snow v. Allen, 227 Ala. 615, 151 So. 468 (1933).

[7]Wisz v. Metropolitan Life Ins. Co., 227 Ill. App. 343 (1935).

THE NEW COMMERCIAL CODE

*Gibson B. Witherspoon**

This code is not just for lawyers but for bankers, merchants and the average business man. Each should be able to understand the laws governing their business transactions.

A new Uniform Commercial Code will be substantially completed by January 1, 1950. It is being prepared under the joint sponsorship of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. The proposed acts will be a complete codification of the law relating to commercial transactions and include the law of sales, negotiable instruments, bank collections, investment instruments and related fields.

Mississippi has enacted about 15% of the uniform acts proposed. New York has twenty-four uniform laws enacted, which is about 70% of all the uniform acts promulgated. In the states which do not depend so largely on commerce we find fewer uniform acts. Their wide acceptance is due to the obvious fact that commerce has no regard for state lines. The general public, especially the average business man, has welcomed a chance to alleviate the perplexing differences in laws of the several states which serve only as a burden on legitimate enterprise and freedom of commerce between various businesses in different jurisdictions. The public rightfully looks to the Bar for guidance and especially is this true in the matter of uniform legislation. Therefore, the bar should familiarize itself with the work of the commissioners and give them the benefit of their suggestions and advices. Tentative drafts are available through the Executive Office of The American Law Institute, 3400 Chestnut Street, Philadelphia 4, Pennsylvania, or the National Conference of Commissioners on Uniform State Laws, First National Bank Building, Omaha 2, Nebraska.

You will find the new Code streamlined and carefully drafted to fit into our modern business transactions. The sections are composed of short, concise statements couched in language as simple as legal accuracy will permit. The Code is not just for lawyers but for bankers, mechants and the average business man. Each should be able to understand the laws governing their business transactions. Expect a good practical code when it is completed, well arranged, ably indexed and executed with a very high degree of literary merit and you will not be disappointed.

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*Attorney at Law, Meridian, Miss.; Commissioner for Mississippi to the National Conference on Uniform State Laws.

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1948-1949

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THE FEDERAL TORT CLAIMS ACT*

The doctrine of sovereign immunity from suit is deeply rooted in the history of the common law countries. This doctrine has been expressed in many ways, but no expression became as common as "the King can do no wrong."[1] In England the doctrine of sovereign immunity appears to have been accepted without question or at least without serious attempts to overthrow it until the nineteenth century.[2] However, in Continental Europe private suits against the sovereign, in cases where the sovereign was acting in its corporate capacity, have been allowed since the time of the Roman Empire. At the end of the nineteenth century the only countries in which the State still claimed immunity from suit in tort were England and the United States.[3]

The concept of sovereign immunity, which formed a part of the common law of England, was adopted in the United States.[4] Two theories have been advanced to justify this immunity in this country: (1) "the King can do no wrong,"[5] and (2) the State, the authority that makes the law, cannot be subject to law, and cannot be chargeable with or sued in tort.[6]

Regardless of the theory that may be advanced to support the doctrine of sovereign immunity, it was so thoroughly entrenched in the common law of England when it was taken over by the United States it became a part of our common law. The individual who had suffered a loss as the result of a tort or a breach of contract on the part of the United States was without a remedy as a matter of right. The injured or damaged person had no legal claim for his loss, and his right to be compensated depended upon his political fortune or influence with the members of Congress. His only remedy was by way of a private claim bill introduced in Congress. Such bill, if enacted, would provide for payment in the amount Congress saw fit to set.[7] This procedure was slow, inadequate, and often unjust.

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*This note was prepared as part of the work in a seminar in contemporary legal trends at the University of Mississippi Law School.

[1]For an excellent discussion on the theory of sovereign immunity see Borchard, *Governmental Responsibility in Tort,* 36 YALE L.J. 1, 757, 1039 (1926-27).

[2]By the Crown Proceedings Act, 1947, Great Britain waived sovereign immunity from suit in certain tort actions.

[3]Borchard, *supra* note 1, at 2 and 3.

[4]United States v. Clarke, 8 Pet. 436 (U.S. 1834); Eastern Transport Co .v. United States, 272 U.S. 675 (1927).

[5]Gibbons v. United States, 8 Wall. 269 (U.S. 1869); Langford v. United States, 101 U.S. 341 (1879).

[6]Kawananakoa v. Polyblank, 205 U.S. 349 (1907); The Western Maid, 257 U.S. 419 (1922).

[7]Gottlieb, *Tort Claims Against the United States,* 30 GEO. L.J. 462, 464, 465 (1942).

Congress was aware of the inadequacy of the procedure in handling private claims, but hesitated in conferring authority upon the federal courts to handle them. Eventually, the ever increasing scope of governmental activities made it necessary for Congress to free itself from some of the burden of considering private claim bills.[8]

Previous Legislation

The first response of Congress to the necessity of reducing the number of private claim bills being introduced was the establishment of the Court of Claims in 1855.[9] The Court of Claims was given jurisdiction over claims against the United States founded upon any law of Congress or upon a contract, express or implied. Now that Congress had expressly waived sovereign immunity from suit in certain instances, it was only a question of time until further inroads were to be made. In 1877 the Tucker Act[10] was passed giving federal district and circuit courts concurrent jurisdiction with that of the Court of Claims.

In 1910 the United States submitted itself to suit for infringement of patents.[11] Suits under this Act are for just compensation for the taking of patent rights by eminent domain. But again, as under the Tucker Act, liability of the United States Government for the torts of its employees was expressly exempt.

In 1916 the Federal Employees' Compensation Act[12] was passed. This Act granted compensation to any civil employee or his dependents for the death or disability of such government employee sustained while in the performance of his duty. A commission was established to administer the Act and to hear and determine all claims brought under it.

In 1922 the Small Claims Act[13] was passed. By this Act authority was given to the heads of departments and establishments of the Federal Government to consider and determine claims for private property damage due to the negligence of an officer or employee of the Government while acting within the scope of his employment. This Act limited claims to $1,000 and did not provide for a court review of the decision of the department head.

In 1925[14] the Suits in Admiralty Act of 1920[15] was extended. By this

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[8]It has been estimated that over 2,000 private claim bills were introduced in each Congress prior to the passage of the Tort Claims Act in 1946.

[9]62 Stat. 992, 28 U.S.C. § 1491 (1948). Jurisdiction of Court of Claims restricted to cases "not sounding in tort."

[10]62 Stat. 992, 28 U.S.C. § 1346 (1948).

[11]62 Stat. 992, 28 U.S.C. § 1498 (1948).

[12]39 Stat. 742 (1916), 5 U.S.C.A. § § 751-798 (1927).

[13]42 Stat. 1066 (1922), 31 U.S.C.A. § § 215-217 (1940).

[14]43 Stat. 112 (1925), 46 U.S.C.A. § 781 (1944).

[15]41 Stat. 525 (1920), 46 U.S.C.A. § § 741-742 (1944).

statute a private individual, whose vessel had been damaged by a public vessel of the United States, was given the right to maintain a suit against the United States. The Suits in Admiralty Act of 1920 was the first real departure from the traditional tort immunity theory. By this Act Congress consented to an individual maintaining a libel in admiralty against the United States for damage done to private vessels by the negligence of employees or vessels owned or operated by the Government.[16]

The Federal Tort Claims Act,[17] which became law on August 2, 1946, as a part of the Legislative Reorganization Act, was designed to eliminate some of the major defects of the remedies outlined above in addition to providing an entirely new remedy in the field of governmental torts. The passage of this statute marked a major departure from the common law doctrine of sovereign immunity from suit for torts, but the theories upon which it is based are not new and have been advocated by leading lawyers and politicians for many years. As early as 1832, John Quincy Adams advocated the elimination of private claim bills from Congress.[18] On many occasions President Lincoln expressed his belief that the Federal Government should be liable for its torts.[19] However, no bill designed to remove the tort immunity of the Federal Government was introduced in Congress until 1923. This bill failed to pass, but it was followed by the introduction of similar bills in almost every session of Congress until 1939.[20]

Government corporations created in recent years have been given the authority "to sue and be sued" in their own name, but until the United States Supreme Court's decision in *Kiefer & Kiefer v. Reconstruction Finance Corporation*[21] it was held that such government corporations could not be sued in tort. However, in this decision the Court, after considering the enabling statute, held that government corporations could be sued in tort. Some writers on sovereign immunity have stated that the opinion of Mr. Justice Frankfurter in the *Kiefer* case all but invited the passage of a tort claims act.[22] Following this decision bills designed to remove government immunity from suit in tort were again introduced in Congress at

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[16]Commissioners of the State Insurance Fund v. United States, 72 F. Supp. 549, 553 (S.D. N.Y. 1947).

[17]60 STAT. 842, 28 U.S.C.A. § § 921-946 (Supp. 1946), as repealed and reenacted by 62 STAT. 992, 28 U.S.C. § § 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1948).

[18]8 MEMOIRS OF JOHN QUINCY ADAMS 479-480 (1876).

[19]MILLER, LIFE AND WORKS OF ABRAHAM LINCOLN, (1907) State Papers 37.

[20]For a history of the tort claim bills introduced in Congress from 1923 to 1946 see Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*. 35 GEO. L. J. 1 (1946).

[21]306 U.S. 381 (1939).

[22]Gottlieb, *supra* note 7, at 467.

almost every session, and success was finally achieved by the passage of the Federal Tort Claims Act in 1946.[23]

The Tort Claims Act—Sectional Analysis

Two methods of procedure are provided under the Federal Tort Claims Act. The Act provides for (1) the administrative adjustment of an individual's tort claim where the amount claimed is $1,000 or less and (2) provides for suits against the United States in the federal district courts irrespective of the amount claimed.

Administrative Adjustments under the Act

Authority is conferred upon the head of each federal agency to "consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States for injury to or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[24] If the claimant questions the decision of the head of the federal agency, he may, after final disposition of the claim by such federal agency, bring suit in the district court. This right to a court review is a decided improvement over the Small Claims Act of 1922.

All administrative adjustments are expressly limited by the other exceptions and limitations in the act.[25] Aside from the express exceptions set forth in the Act, issues will likely arise over the definitions given certain phrases such as "federal agency," "employee of the government," and "negligent or wrongful act or omission." Congress undertook to define "federal agency," "employee of the government," and "acting within the scope of his office or employment," but the definitions themselves contain terms which may well lead to controversy.[26]

Any award made to the claimant shall be paid by the head of the federal agency concerned out of appropriations that may be made therefor. The acceptance of any settlement, award or compromise by a claimant shall be final and conclusive and shall constitute a complete release of any claim against the United States and the employee whose act or omission

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[23]The following states had already waived their immunity against suit in tort in limited cases: New York, Arizona, California, Illinois.

[24]62 Stat. 992, 28 U.S.C. § 2672 (1948).

[25]62 Stat. 992, 28 U.S.C. § § 2401(b), 2671, 2674, 2675, 2676, 2678, 2680 (1948).

[26]For a discussion of the questions likely to arise out of these definitions *see* Baer, *Suing Uncle Sam in Tort,* 26 N.C.L. Rev. 122-124 (1948).

gave rise to the claim. Each head of a federal agency must submit a report annually to Congress of all claims settled.[27]

Suits under the Act

Exclusive jurisdiction is conferred upon the federal district court where the plaintiff is a resident or where the act or omission occurred,[28] sitting without a jury,[29] to hear, determine, and render judgments on any claim against the United States, for money only, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[30] The United States shall not be liable for interest prior to judgment or for punitive damages. However, within a jurisdiction where only punitive damages may be recovered, the United States shall be liable for actual or compensatory damages measured by the pecuniary injuries that resulted from the negligent act or omission.[31] Costs shall also be allowed in all courts to the successful claimant, except that such costs shall not include attorney's fees.[32]

No mention is made as to a jurisdictional amount; therefore, it appears that the plaintiff may sue for any amount under the Act. To date there has been only one case in which the United States has raised the question of jurisdictional amount. In *Bates v. United States*[33] the plaintiff brought suit under the Act for $2,000. The United States made a motion to dismiss the claim, alleging that the district court did not have jurisdiction unless the amount in controversy exceeded $3,000 exclusive of interest and cost. The court dismissed the motion holding that actions can be maintained against the United States under the Tort Claims Act regardless of the amount in controversy.

Trial by jury is denied. That this is not a denial of a constitutional right, where the United States has given its consent, by statute, to be sued, has been held several times.[34] The United States Supreme Court has held that the constitutional guarantee of a jury trial extends of right

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[27]*Supra* note 24.
[28]62 STAT. 992, 28 U.S.C. § 1402(b) (1948).
[29]62 STAT. 992, 28 U.S.C. § 2402 (1948).
[30]62 STAT. 992, 28 U.S.C. § 1346(b) (1948).
[31]62 STAT. 92, 28 U.S.C. § 2674 (1948).
[32]62 STAT. 992, 28 U.S.C. § 2412(c) (1948).
[33]76 F. Supp. 57 (D. Nebr. 1948).
[34]Similar provisions in the Tucker Act were upheld by the United States Supreme Court in McElrath v. United States, 102 U.S. 426 (1880).

only to those situations where it could have been demanded at the time the Constitution was adopted.[35]

All claims are to be governed by the law of the place where the alleged tort occurred. Thus, the doctrine of *Erie Railroad v. Tompkins*[36] is expressly written into the Act. In *Parmiter v. United States*[37] the district judge in interpreting that part of Section 410(a) (now Section 1346(b) of Volume 28 of the United States Code) which provides that the United States shall be liable "in accordance with the law of the place where the act or omission occurred" held that the issues of negligence, causation, and damages are to be determined in accordance with the law of the place where the act or omission giving rise to the claim occurred. It would seem that this statement is correct; however, controversies seem certain to arise when the law of the place where the alleged tort occurred is in conflict with a specific provision of the Tort Act. This problem is most frequently encountered in cases involving the statute of limitations and shall be considered in greater detail under that section of the Act.

It should be noted that several conditions set forth in Section 1346(b) must be fulfilled before the claimant may recover. The alleged tort must have been committed by: (1) the negligent or wrongful act or omission of an employee of the Federal Government; (2) while such employee was acting within the scope of his office or employment; (3) under such circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred. Therefore, the wrongful act must have been committed while the employee was acting within the scope of his employment; and if the employee was not acting within the scope of his employment, the United States has been held not liable although there was in existence a state statute making a private person under similar circumstances liable. In *Long v. United States*[38] the district court found as a matter of fact that the driver of the army vehicle which caused the injury to the plaintiff was not acting within the scope of his employment when the accident occurred. The plaintiff then alleged that the Government was liable under the California statute which provided that the owner of the vehicle causing the injury shall be liable without regard to the doctrine of respondeat superior. Plaintiff based this contention on that part of Section 410(a), (now Section 1346(b) of Volume 28 of the United States Code) which provides that the United States shall be liable under circumstances where a private person would

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[35]Liberty Oil Co. v. Condon Natl. Bank, 260 U.S. 235 (1922); Black v. Jackson, 177 U.S. 349 (1899).
[36]304 U.S. 64 (1938).
[37]75 F. Supp. 823 (D. Mass. 1948).
[38]78 F. Supp. 35 (S.D. Calif. 1948).

be liable to the claimant under the laws of the place where the injury occurred, and a private vehicle owner would be liable to the plaintiff under this California statute. The court, after repeating the often used phrase that a statute in derogation of the common law must be strictly construed, held that by the Tort Claims Act the United States has waived immunity to suit only as to claims caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment; that claims arising under local law imposing liability upon an employer for conduct of an employee outside the scope of his employment are not embraced within the waiver.[39]

A major problem of statutory construction that has confronted the courts is whether the comprehensive phrase "any claim against the United States, for money only"[40] in Section 410(a) of the Act should be narrowed by construction so as to exclude claims made by members of the armed forces for injuries sustained while in such service. The Government has adopted the view that benefits received by members of the armed forces under other legislation are exclusive and are a bar to any action by them under the Tort Act. However, a literal reading of the Act would seem to indicate that no limitation was placed on members of the armed forces so as to prohibit suit by them. The district courts have jurisdiction to hear *any claim* arising under the Act, and no restriction is placed upon who may bring that claim. Nor are members of the armed forces mentioned in the express exceptions to the Act. The district courts are in conflict in their holding upon the question.[41] The only circuit court decision to date[42] has held that suits by members of the armed forces are not included, by implication, within the meaning of the Act.[43]

In *Jefferson v. United States*[44] the plaintiff brought suit against the United States under the Tort Act to recover damages for injuries allegedly caused by a negligent operation performed on him in July, 1945, by an

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[39]*Accord,* Murphy v. United States, 79 F. Supp. 925 (N.D. Calif. 1948); *Contra:* Perucki v. United States, 76 F. Supp. 34 (M.D. Pa. 1948) (United States held liable although a private person under similar conditions would not have been liable).

In Gray v. United States, 77 F. Supp. 869 (D. Mass. 1948) the United States was held not liable to a subrogee since a private person under Mass. law would not have been liable.

[40]Under 62 STAT. 992, 28 U.S.C. 1346(b) (1948) this phrase has now been altered to read "civil actions on claims" instead of "any claims."

[41]The following district court decisions have held that members of the armed forces may sue under the Tort Act: Alansky v. Northwest Airlines, Inc., 77 F. Supp. 556 (D. Mont. 1948); Jefferson v. United States, 74 F. Supp. 209 (D. Md. 1947) (on motion to dismiss); Sarson v. United States, 79 F. Supp. 406 (S.D. N.Y. 1947). *Contra:* Jefferson v. United States, 77 F. Supp. 706 (D.Md. 1948); Troyer v. United States, 79 F. Supp. 558 (W.D. Mo. 1947). *Cf.* Wham v. United States, 81 F. Supp. 126 (D.C. D.C. 1948) (involves Metropolitan Police of District of Columbia).

[42]This paper completed April 15, 1949.

[43]United States v. Brooks, 169 F.2d 840 (C.C.A. 4th 1948).

[44]74 F. Supp. 209 (D. Md. 1947).

army surgeon in the State of Virginia. At the time of the operation the plaintiff and the surgeon were on active duty with the military forces of the United States. The United States moved to dismiss the action contending that the Tort Act impliedly did not provide for such a suit by a member of the armed forces because compensation for such damages has otherwise been provided by disability payments. The motion to dismiss was overruled without prejudice since such an action was not expressly prohibited by the Act, and many of the prior bills had affirmatively excluded claims for which compensation was otherwise provided. However, on the trial of the case[45] Judge Chestnut, after holding as a matter of fact that the surgeon had been negligent, dismissed the complaint against the United States saying:[46]

> It is a familiar rule of statutory construction that the merely literal reading of particular words in an Act can be narrowed by construction where, from the whole subject matter of the particular Act and its setting in the whole governmental scheme, the court can see that the literal import of the phrase used is contrary to established policy and would not accord with the real intention of Congress in passing the Act, and for this purpose we may look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.

Judge Chestnut admitted that this case did not come within the express exceptions to the Act but called it an implied exception which comes not from the wording of the Act itself but from long existing other legislation.[47]

In *United States v. Brooks*[48] two actions were brought under the Tort Act. One action was by Welker Brooks for injuries sustained when a car in which he was riding collided with an army truck, and the second action was by James Brooks, administrator of estate of Arthur Brooks, deceased, against the United States to recover for the death of the deceased as a result of the same collision. At the time of the accident Welker and Arthur Brooks were both enlisted men in the United States Army. They were on leave and not on government business. Judge Dobie, writing the majority opinion for the court, held that the plaintiffs could not recover under the

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[45] 77 F. Supp. 706 (D. Md. 1948).

[46] *Id.* at 711 and 712.

[47] Judge Chestnut cited the following cases against the United States under the Public Vessels Act to sustain his opinion: Dobson v. United States, 27 F.2d 807 (C.C.A. 2d 1928), *cert. denied*, 278 U.S. 653 (1928); Bradley v. United States, 151 F.2d 742 (C.C.A. 2d 1945), *cert. denied*, 326 U.S. 795 (1945).

[48] 169 F.2d 840 (C.C.A. 4th 1948).

Act and cited the opinion of Judge Chestnut in the *Jefferson* case with approval. Judge Dobie said:[49]

> Congress has established a complete and comprehensive administrative system of compensation to take care of the death of, or injury to, servicemen. . . . Certainly there is force in the suggestion that Congress through this system of benefits took adequate care of soldiers and intended thereby to exclude soldiers from the right to sue the United States for personal injuries received in the service.

Judge Parker, writing a dissenting opinion, based his dissent on the belief that the court is without the power to write into the Act by interpretation a section which Congress has deliberately omitted.[50]

Problems similar to those presented in a suit by a member of the armed forces under the Tort Act are presented when a civilian employee of the Federal Government sues under the Act after having voluntarily received and accepted benefits under the Federal Employees' Compensation Act.[51] If the injured civilian employee is entitled to compensation under the Compensation Act, he is not required to accept it, but can elect to sue under the Tort Act.[52] However, it seems clear from the wording of the Compensation Act that if the employee obtains compensation under the Compensation Act or recovers under the Tort Claims Act, he cannot then seek relief under the other Act.[53]

Any judgment recovered against the United States under the Act shall be a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim.[54] As yet there have been no decisions interpreting this section, but questions are likely to arise when it is considered with that part of Section 2674 which provides that the United States shall not be liable for punitive damages. For example, suppose a claimant was injured in a state that allows both compensatory and punitive damages. After recovering compensatory damages from the United States, can the

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[49]*Id.* at 842.

[50]Many of the prior tort claim bills did affirmatively include in the mentioned exceptions claims for which compensation was provided by the Federal Employees' Compensation Act, 5 U.S.C.A. § 751 *et seq.*, or by the World War Veterans' Act of 1934. The present Tort Act is silent upon this subject.

[51]39 STAT. 742 (1916), 5 U.S.C.A. § § 751-798 (1927).

[52]*See* 39 STAT. 742 (1916), 59 STAT. 503 (1945), 5 U.S.C.A. § § 767, 768, 770 (Supp. 1946).

[53]Dahn v. Davis, 258 U.S. 421 (1922); Brady v. Roosevelt S.S. Co., 317 U.S. 575 (1943). *Cf.* White v. United States and Crawley v. United States, 77 F. Supp. 316 (D.N.J. 1948) (where the accident occurred prior to enactment of Tort Act).

[54]62 STAT. 992, 28 U.S.C. § 2676 (1948).

claimant sue the individual employee for punitive damages? Presumably such an action would fail since Section 2676 provides that a judgment against the United States shall be a complete bar to *any* action by the claimant against the employee.

Section 2675 of Volume 28 of the United States Code provides that no suit shall be instituted in a district court where such claim has been presented to any federal agency, unless such federal agency has made final disposition of the claim.[55] However, the claimant may, after filing a claim with a federal agency, withdraw such claim by giving fifteen days notice in writing to the federal agency and then proceed by bringing suit in the proper district court. If the claimant should decide to bring suit after his claim presented to the federal agency has been rejected by the agency or withdrawn by him, he cannot sue for more than the amount of the claim he presented to the federal agency unless such increase is based on newly discovered evidence.[56] Any disposition of a claim presented to the federal agency may not be used as evidence of liability or amount of damages if the claimant later brings suit in a district court on the same claim.

Procedure

Section 2072 provides that the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the Federal Rules of Civil Procedure.[57] It should be remembered that Section 1346(b) provides that the substantive law to be applied by the district courts is that of the place where the negligent or wrongful act or omission took place. It seems logical that questions will arise as to what is procedural and substantive law in a given case, since there is a conflict of decisions as to when rules of law should be classified as procedural or substantive.[58] Consider the problem of the application of the doctrine of *res ipsa loquitur*. Several courts of appeals have recently held that the doctrine is a matter of substantive rather than procedural law, and that its applicability must be determined by the law of the place of the injury.[59] However, some states have held the doctrine of *res ipsa loquitur* to be a matter of procedure. In a suit brought in a state holding that the doctrine is a matter of procedure, what will be the proper rule to be applied?[60] No cases were found concerning this question under the Tort Claims Act.

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[55]Marino v. United States, 82 F. Supp. 190 (S.D. N.Y. 1948).

[56]Craum v. United States, 78 F. Supp. 840 (M.D. Pa. 1948).

[57]*See* Collet, *Federal Tort Claims Act,* 8 F.R.D. 1, 4 (1948) where Judge Collet sets out some procedural steps to be followed in bringing suit under the Tort Claims Act.

[58]*See* Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 108 (1945).

[59]Lachman v. Pennsylvania Greyhound Lines, Inc., 160 F.2d 496 (C.C.A. 4th 1947).

[60]For a general discussion of procedural and substantive law see GOODRICH, CONFLICT OF LAWS 187 (1938).

A procedural question that has already arisen under the Tort Act involves the right of a plaintiff to join an individual, as a joint tort-feasor, in his suit against the United States.[61] In the cases that have arisen, the Government has contended that the Act specifies only a proceeding against the United States and there is no authority to join anyone else.[62] The impression received from a literal reading of Section 1346(b) would seem to sustain the Government's contention. However, the Federal Rules of Civil Procedure are to apply to the Act. Rule 20 of the Civil Procedure Act provides that all persons may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions and if any question of law or fact common to all of them will arise in the action. The question is further complicated by the fact that the Tort Act provides for a trial without a jury whereas the individual defendant has a right to a jury trial.

The first reported case dealing with this problem is *Englehardt v. United States.*[63] In that case the plaintiff, a citizen of Maryland, sued the United States and a citizen of Delaware as joint tort-feasors. The individual defendant moved to dismiss the action as to him because the Act was intended, he said, to restrict suits against the United States to cases where the United States alone is sued as the only defendant; therefore, it is not permissible to include an individual defendant jointly with the United States as a joint tort-feasor. The individual defendant further contended that he was entitled to a jury trial under the Seventh Amendment, and the Tort Act expressly stated that the claim was to be heard by the district judge sitting without a jury. Judge Chestnut dismissed the motion and held that an individual could be joined with the United States as a joint tort-feasor. When the case was tried on its merits the court heard the claim against the United States without a jury while simultaneously presiding over a jury trial against the individual defendant. The jury returned a verdict against the individual defendant in the amount of $3,000, and the judge then assessed the identical amount of damages against the United States. As a matter of convenience Judge Chestnut could have ordered separate trials under Rule 42(b) of the Civil Practice Act.

It should be noted that in the *Englehardt* case there existed a diversity of citizenship between the claimant and the individual defendant. In two

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[61]See the following cases on this problem: Englehardt v. United States, 69 F. Supp. 451 (Md. 1947); Dickens v. Jackson, 71 F. Supp. 753 (E.D. N.Y. 1947); Bullock v. United States, 72 F. Supp. 445 (D. N.J. 1947); Uarte v. United States, 7 F.R.D. 705 (S.D. Calif. 1948).

[62]For a comment on the position taken by the Attorney General *see* Collet, *Federal Tort Claim Act*, 8 F.R.D. 1, 3 (1948).

[63]69 F. Supp. 451 (D. Md. 1947).

cases where there was a lack of diversity of citizenship between the claimant and the individual defendant, the court refused to allow an individual joint tort-feasor to be joined with the United States. In *Dickens v. Jackson*[64] the court dismissed the suit against the individual defendant because of a lack of diversity of citizenship between him and the claimant. In *Bullock v. United States*[65] the same lack of diversity of citizenship as between the plaintiff and the individual defendant was present. The judge upon his own motion dismissed the case as to the individual defendant, but in so doing held that there could be a joinder of an individual tort-feasor with the United States where the requisite diversity of citizenship existed.

A result *contra* to that in the *Englehardt* case was reached by Judge Yankwich in *Carte v. United States*.[66] This was an action against the United States and the Golden Gate Company, Ltd., as joint tort-feasors under the Tort Act. The Government moved to dismiss the complaint upon the ground that it did not state a claim within the jurisdiction of the district court. This motion to dismiss was refused, but the court, upon its own motion, dropped the action as to the private corporation. Judge Yankwich stated that in his opinion the Act contemplates that the United States shall be the *sole* defendant because a judgment against the United States is a bar to any action against the employee and because the Act specifically denies a jury trial. To support his opinion he cited legislative comments on prior similar acts as showing that the intent of Congress was not to have other defendants joined with the Government.[67]

The reasons given by Judge Yankwich for dismissing the suit as to the private corporation were not based upon the narrow ground that there was a lack of diversity of citizenship between the plaintiff and the individual corporation. Indeed, it is not even clear whether there was such diversity. He seems to base his reason on the ground that no such joinder is permitted by the Tort Act whether there is diversity of citizenship between the claimant and the individual defendant or not.

The above cases show the conflict now existing in the district court decisions over the question whether the Government may be joined with a joint tort-feasor. As yet, no decisions on this question have been reported from the circuit courts and any prediction as to the final outcome would be

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[64] 71 F. Supp. 753 (E.D. N.Y. 1947).
[65] 72 F. Supp. 445 (D.N.J. 1947).
[66] 7 F.R.D. 705 (S.D. Calif. 1948).
[67] The House Committee on the Judiciary in reporting on H.R. 181, 79th Congress, First Session, 1945—a bill identical with 28 U.S.C. § 1346(b), stated: "The bill therefore does not permit any person to be joined as a defendant with the United States and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill." H. R. Judiciary Committee Rep. on H.R. 181, 79th Cong., 1st Sess. (1945).

useless. However, assuming that joinder of joint tort-feasors will be sustained by the higher courts, what jurisdictional facts must appear as to the individual defendant? Must there be diversity of citizenship between the plaintiff and the individual defendant? Must the claim against the individual defendant be for an amount in excess of $3,000 exclusive of interest and costs? Judge Hulen, United States District Judge for the Eastern District of Missouri, in commenting upon the Tort Act states that these questions must be answered in the affirmative.[68]

One of the most litigated questions that has arisen under the Tort Act is whether the United States is liable to subrogees and assignees of the injured person. This question is squarely presented when a government owned and operated vehicle collides with a private vehicle, and the owner of the private vehicle is compensated by an insurer for any damages done. Can the insurance company, who becomes subrogated to the rights of the insured, bring an action under the Act for the amount paid the insured, or must such action be brought in the name of the vehicle owner? The Government has taken the position that actions by assignees or subrogees are barred by the Anti-Assignment Act,[69] and since the Tort Act relaxes sovereign immunity, a strict construction of the grant of authority is required. The district courts throughout the country have been divided on this question,[70] but six courts of appeals decisions have held that such an action may be maintained by an insurance company, as subrogee.[71]

In *Old Colony Insurance Company v. United States*[72] suit was brought by an insurance company under Section 410(a) (now Section

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[68]Hulen, *Suits on Tort Claims Against the United States,* 7 F.R.D. 689, 700 (1947).

[69]The Anti-Assignment statute provides that all transfers and assignments made of any claim against the United States shall be void unless made after allowance of the claim and the issuance of a warrant. 35 STAT. 411 (1908), 31 U.S.C.A. § 203 (1927).

[70]The following district court decisions hold that an insurance company, as subrogee, can maintain an action against the United States under the Tort Act: Wojciuk v. United States, 74 F. Supp. 914 (E.D. Wis. 1947); Grace v. United States, 76 F. Supp. 174 (D. Md. 1948); Niagara Fire Ins. Co. v. United States, 76 F. Supp. 850 (S.D. N.Y. 1948); Ins. Co. of North America v. United States, 76 F. Supp. 951 (E.D. Va. 1948); Town of Amherst v. United States, 77 F. Supp. 80 (W.D. N.Y. 1948); Newsum v. Pennsylvania R. Co., 79 F. Supp. 225 (S.D. N.Y. 1948) (held that there was no difference between an indemntee and subrogee); Gray v. United States, 77 F. Supp. 869 (D. Mass. 1948). *Contra:* Rusconi v. United States, 74 F. Supp. 669 (S.D. Calif. 1947) *reversed sub nom* by Employers' Fire Ins. Co. v. United States, 167 F.2d 655 (C.C.A. 9th 1948); Cascade County v. United States, 75 F. Supp. 850 (D. Mont. 1948); Old Colony Ins. Co. v. United States, 74 F. Supp. 723 (S.D. Ohio 1947) *reversed by* 168 F.2d 931 (C.C.A. 6th 1948).

[71]Employers' Fire Ins. Co. v. United States, 167 F.2d 655 (C.C.A. 9th 1948); Old Colony Ins. Co. v. United States, 168 F.2d 931 (C.C.A. 6th 1948); Aetna Casualty & Surety Co. v. United States, 170 F.2d 469 (C.C.A. 2d 1948); United States v. South Carolina State Highway Department, 171 F.2d 893 (C.C.A. 4th 1948); State Farm Mut. Ins. Co. v. United States, 172 F.2d 737 (C.C.A. 1st 1949); Yorkshire Ins. Co. v. United States, 171 F.2d 374 (C.C.A. 3rd 1948).

[72]168 F.2d 931 (C.C.A. 6th 1948).

1346(b) of Volume 28 of the United States Code) of the Act. The insurance company alleged that an army truck ran into an automobile owned by one Elliott, that the automobile was insured by the plaintiff, that the insurer paid for the damages to said automobile under an insurance policy issued to Elliott by the insurance company, that the insurer thereby became subrogated to the rights of the insured and is entitled to sue the United States under the Tort Act for the amount paid the insured. The United States moved to dismiss on the ground that the Act does not authorize the maintenance of suits upon derivative claims, and that the Anti-Assignment Statute forbids the insurance company's action. The district court sustained the Government's motion, but on appeal the court of appeals in reversing held that the word "claimant" simply means one who has a claim against the United States, and the Act does not limit the meaning of the word "claimant" to one who has sustained damage to his property.

It is submitted that subrogees should be allowed to sue under the Tort Act. If Congress had intended to exclude subrogees, it could have included them in the list of specified exceptions. The Anti-Assignment Statute is not applicable since it applies only to voluntary assignments and not to equitable assignments or assignments by operation of law, such as a subrogee.[73] The Act also makes applicable the new Federal Rules of Civil Procedure. Rule 17(a) provides that: "Every action shall be prosecuted in the name of the real party in interest." Is not the insurance company the real party in interest as to the amount that it has paid the insured?[74]

Limitation Period

Section 2401(b) of Volume 28 of the United States Code provides for a short and unusual limitation period. This section states that any claim cognizable under the Act shall be forever barred unless within one year after the claim accrues such claim is presented to a federal agency, or an action is begun. However, if a claim is filed with an agency, the time to institute suit is tolled for six months following notice of action on the claim, or six months from date of withdrawal of the claim.

The statute of limitations is unusual in that it contains no saving clause or provision which would toll the statute where infants, insane persons, or others under disability are concerned. Therefore, the limitation of one year will probably apply to all claimants whether they are under a disability or not.

Although this limitation statute seems to be clear and definite, the district courts have had occasion to interpret it several times. *State of Mary-*

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[73]Employers' Fire Ins. Co. v. United States, 167 F.2d 655 (C.C.A. 9th 1948).
[74]Grace v. United States, 76 F. Supp. 174, 175 (D. Md. 1948).

land, to the Use of Burkhardt v. United States[75] was an action against the United States for wrongful death of petitioner's husband, who was killed when the automobile in which he was riding was in a collision with a truck operated by a member of the armed forces The decedent was killed on September 2, 1945, and this action was instituted December 5, 1946. Under Maryland law, where the accident occurred, all claims for wrongful death must be begun within twelve months after the cause of action arose. The United States moved to dismiss contending that since the action could not be maintained against a private person it cannot be maintained against the United States. Judge Chestnut in granting the defendant's motion held that since under Maryland law a private individual would not be liable, the United States could not be liable.

On appeal[76] the court of appeals reversed and held that the Maryland statute of limitations did not apply. Judge Parker, writing the opinion for the court, stated:[77]

> Under the Federal Tort Claims Act the law of the state must be considered for the purpose of defining the actionable wrong for which liability shall exist on the part of the United States; but the Act itself fixes the limitation of time within which action shall be instituted to enforce the liability.
>
> We think it is a reasonable and necessary interpretation of the Tort Claims Act that the law of the state is to be followed with respect to the cause of action created but not with respect to the time limitation for suit upon it, since the Act itself prescribes its own time limitations.

It seems apparent from this holding that it makes no difference whether the state limitation statute be construed as a limitation upon the right of action itself or not; the court will apply the one year limitation period provided in the Act to the exclusion of any state limitation statute.[78]

Exceptions

Section 2680 sets out certain express exceptions to the Act. These exceptions are that the provisions of the Act shall not apply to any claim based upon: (a) an act or omission of an employee of the Government who

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[75]70 F. Supp. 982 (D. Md. 1947).

[76]State of Maryland, to the Use of Burkhardt v. United States, 165 F.2d 869 (C.C.A. 4th 1947).

[77]*Id.* at 873.

[78]Sweet v. United States, 71 F. Supp. 863 (S.D. Calif. 1947); Kohn v. United States, 75 F. Supp. 689 (N.D. Calif. 1948); Commissioner of the State Ins. Fund v. United States and Scannell and Oliver v. United States, 72 F. Supp. 549 (S.D. N.Y. 1947).

is exercising due care in the execution of a statute or regulation whether or not it be valid, or upon the exercise of or failure to exercise a discretionary duty;[79] (b) the negligent transmission of mail matter;[80] (c) the assessment or collection of a tax or customs duty or a detention of goods by custom officials; (d) causes justiciable under the Suits in Admiralty Acts of 1920 and 1925; (e) an act or omission in administering the Trading with the Enemy Act; (f) the imposition of a quarantine; (g) an injury to a vessel while passing through the Panama Canal; (h) an assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; (i) the fiscal operation of the Treasury; (j) the activities of the military or naval forces during time of war; (k) an act done in a foreign country; or (l) any claim based upon the activities of the Tennessee Valley Authority.

It seems apparent that these exceptions were designed to protect the Government in the exercise, through its employees, of necessary governmental functions which it was believed should be completely unhampered and to expressly exempt other situations where the existing remedies were believed to be adequate.[81] If an individual's claim falls within one of the exceptions and no other statute affords him relief, then such individual must seek relief by having a private bill introduced in Congress as was done for all tort claims prior to the passage of the Tort Act.

Only a few cases have been reported which involve the construction and interpretation of the express exceptions to the Act. However, three decisions[82] construing "discretionary duty" have been reported and in view of the vagueness and flexibility of the phrase many future controversies may be expected to center around it. In *Kendrick v. United States*[83] petitioner's husband was killed by a soldier who had received a medical discharge from the Army of the United States. The soldier's illness was diagnosed as an unclassified psychosis and the petitioner charged negligence on the part of the officials of a Veterans' Administration hospital in releasing the soldier. The Court found that the officials had complied with Veterans' Administration regulations and procedures and were performing a discretionary duty in releasing the soldier . Judge Lynne held that the

[79]Exception (a) does not elaborate upon the term "discretionary duty", nor is it defined in the Act itself. See the following cases: Thomas v. United States, 81 F. Supp. 881 (W.D. Mo. 1949); Kendrick v. United States, 82 F. Supp. 430 (N.D. Ala. 1949); Denny v. United States, 171 F.2d 365 (C.C.A. 5th 1948).

[80]Congressional committee reports indicate that this exception was not intended to prevent recovery for an injury received as a result of the negligent operation of a mail truck, but was intended to apply to loss of mail matter that could easily be insured. *See* 86 CONG. REC. 12019 (1940).

[81]Gottlieb, *supra* note 20, at 1 and 40.

[82]*Supra* note 79.

[83]82 F. Supp. 430 (N.D. Ala. 1949).

case fell clearly within exception (a). In *Thomas v. United States*[84] the plaintiff alleged that members of the Corps of Engineers of the War Department carelessly and negligently planned and caused to be installed a revetment in the Missouri River so as to cause water from the river to flow upon his land. Judge Duncan found that the flood control plan had been approved by Congress. He then held that the details or method of carrying out the flood control plan was a discretionary duty for which the United States was not liable.

Questions concerning the definition and application of the phrase "foreign country" in exception (k) have arisen on several occasions. In *Brunell v. United States*[85] claimant, traveling with an U.S.O. show in Saipan, was injured through the negligence of a military jeep driver. Claimant brought suit under the Tort Act contending that in October, 1945, when the accident occurred, Saipan was not a foreign country since it had been conquered by the United States and was then under its control. Judge Ryan, holding that Saipan came within exception (k), said that the provision of the Act excluding from its application claims arising in a foreign country limits the operation of the Act to areas which are actually a component part or political subdivision of the United States. In *Straneri v. United States,*[86] where a similar question was involved, Judge Ganey stated that the term "foreign country" as used in the Act means all lands other than those for which Congress is the supreme legislative body.

In *Skeels v. United States*[87] the court considered exception (j). In that case the deceased was killed by a falling object which apparently fell from a United States Army aircraft flying overhead. Decedent's administrator brought suit under the Act alleging negligence on the part of the pilot of the aircraft. The Government, moving to dismiss, showed that the United States was at war at the time of the accident and that the aircraft was engaged in military target practice. The court refused to dismiss and held that combat activities means the actual engaging in the exercise of physical force, and does not include training or practice for combat far removed from the zone of combat.

Compromise and Settlement of Claims

Section 2678 authorizes the attorney general to arbitrate, compromise, or settle any claim upon which suit has been brought. As the local United States district attorney actually handles litigation under the Act, he will

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[84]81 F. Supp. 881 (W.D. Mo. 1949).
[85]77 F. Supp. 68 (S.D. N.Y. 1948); *Cf.* Spelar v. United States, 171 F.2d 208 (C.C.A. 2d 1949).
[86]77 F. Supp. 240 (E.D. Pa. 1948).
[87]72 F. Supp. 372 (W.D. La. 1947).

be the one to recommend a compromise to the attorney general. If the attorney general approves any compromise presented, it will be submitted to the district judge for his approval.

Judge Collet in commenting upon compromises under the Tort Act states that care should be exercised in drawing an order so that it will clearly appear that it is a compromise under Section 413 (now Section 2677) and thus payable out of funds already appropriated. This saves the delay incident to obtaining a special appropriation.[88]

Attorneys' Fees

Section 2678 puts a maximum limit on attorneys' fees regardless of how the controversy is settled. If an administrative adjustment is made, then the head of the federal agency involved may set a reasonable attorney's fee, but this fee shall not exceed ten per centum of the settlement where the amount involved is $500 or more. If suit has been brought upon the claim, then the court or the attorney general, if a compromise is made, may allow an attorney's fee which shall not exceed twenty per centum of the amount recovered where the amount involved is $500 or more.[89] Any attorneys' fees awarded must be paid out of the amount received by the claimant since the United States shall not be liable for attorneys' fees.

Exclusiveness of Remedy

Section 2679 provides that no suit shall be brought against a federal agency which has heretofore had the authority to sue and be sued in its own name when such claims are cognizable under this Act. Thus, the remedy provided by the Tort Act is exclusive when it exists, and all actions cognizable under it must be brought against the United States.

Conclusion

The Federal Tort Claims Act makes a drastic and welcome change in the common law. An injured person's tort claim against the United States, with certain express exceptions, has ceased to be dependent upon the desire of Congress. Such claim is now a legal one against the United States and will be enforced by the federal district courts. At the same time Congress has been relieved of the burdensome task of passing upon the bulk of the private tort claims against the United States.

There are some who argue that the Act has opened the door to a flood of litigation that will prove to be a burden both upon the district courts and the federal treasury. It is true that a great burden of litigation has been placed upon the district courts, but there is no reason to believe that it will

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[88]Collet, *Federal Tort Claims Act,* 8 F.R.D. 1, 5 (1948).
[89]*See* MacHale v. United States, 81 F. Supp. 372 (W.D. Wash. 1949).

be too great. The Act has been in operation well over two years and there are no indications that the district courts have been seriously hampered. Nor is there any reason to believe that the federal treasury will be unduly burdened. During the first 18 months of the Act, only 1300 suits claiming $48,000,000 were filed. This is less than the average number of claims filed with Congress during a like period before the passage of the Act.

The Act has opened a new field of litigation to the legal profession. However, the Act has been criticised by a few attorneys who allege that the fee limitation provision of the Act is unfair. On the whole the fees allowed are probably below the average for similar claims against private individuals, but the increase in litigation should be some compensation for the lower fees. Furthermore, the fee limitation provisions should not startle anyone. Such provisions are common in statutory remedies against the United States. Their validity has been long established.

No fair-minded person questions the purpose of the Act, but there are many who criticize the Act as it is now written. It is alleged that it is not broad enough and does not go far enough in removing sovereign immunity to suit in tort. This charge is true in that the exceptions are very broad and will to some extent defeat the desire to eliminate private claim bills from Congress, but at least, it is a step in the right direction. Now that some definite action has been taken in limiting the doctrine of sovereign immunity to suit in tort, the process of expanding the scope of the Act should not be difficult. It must also be remembered that it will take years to fully interpret it as now written, and until experience so indicates, it might not be advisable to further relax governmental immunity from suit in tort.

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Administrative Law—Scope of Review of Agency Determination of Civil Service Classification

Plaintiff claimed that by reason of the character of his official duties he was entitled to be placed in a higher state civil service classification, with a substantial increase in salary, than that accorded to him by the defendant; that his classification was erroneous, wilfully and deliberately made, and that the commission's action was arbitrary. He sought a writ of mandamus to compel the change in classification. Held: A thorough examination of the record failed to disclose any evidence to justify a finding that the commission acted arbitrarily or in a discriminatory manner. The commission acted in an honest attempt to perform its statutory duty. *Bischoff v. Wayne County,* 320 Mich. 376, 31 N.W.2d 798 (1948).

The powers of a civil service commission are administrative, executive, or ministerial when grading or classifying positions in the civil service.[1] In the exercise of its statutory power, the commission has considerable discretion for ascertaining what duties shall be placed on employees in particular positions, and if additional duties are required, whether they require a reclassification of the position.[2] Courts rarely interfere with classifications as made, unless they are clearly illegal, arbitrary and capricious, or an abuse of sound discretion.[3] In the absence of statutory provisions to the contrary, administrative determinations which concern the internal management of government agencies, such as classifying or grading jobs, are frequently held to be immune from judicial control to a far greater degree than indicated by the general standards.[4] Courts will not substitute their discretion for that of the agency.[5]

Questions of fundamental importance for the administration of a statutory policy are always open to review.[6] But, it is not enough to show that the actions of administrative officers have been unwise or erroneous. It must appear to be so openly contra to fundamental principles as to be the exercise of a whim rather than judgment.[7]

As a jurisdictional matter the civil service agency must always proceed within the defined statutory limits under which it operates.[8] The contention was made and rejected in *Buell v. Frear*[9] that a statute permitting offices in the civil service to be classified by the Civil Service Commission was an unconstitutional delegation of legislative power. The court said that the legislature itself had provided a complete classification of the whole civil service of the state, and had imposed upon the commission merely the duty of arranging the existing offices in accordance with the classification.

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[1]Ault v. Hurley, 291 Mass. 176, 196 N.E. 855 (1935); State *ex rel.* Buell v. Frear, 146 Wis. 291, 131 N.W. 832 (1911).

[2]Otto v. Reardon, 21 Cal. App.2d 260, 69 P.2d 185 (1937); State *ex rel.* Reilly v. Civil Service Commission, 112 P.2d 987 (1941).

[3]Otto v. Reardon, *supra* note 2; State *ex rel.* Reilly v. Civil Service Commission, *supra* note 2.

[4]People *ex rel.* Schan v. McWilliams, 185 N.Y. 92, 77 N.E. 785 (1906).

[5]Dismukes v. United States, 297 U.S. 167 (1935); American Telephone & Telegraph Co. v. United States, 299 U.S. 232 (1936).

[6]Bates & Guild Co. v. Payne, 194 U.S. 106 (1903).

[7]American Telephone & Telegraph Co. v. United States, *supra* note 5.

[8]Spaulding v. Philbrick, 42 Cal. App.2d 58, 108 P.2d 59 (1940); Hill v. Alexander, 338 Pa. 26, 11 A.2d 884 (1940).

[9]146 Wis. 291, 131 N.W. 832 (1911).

The holding in a New York case[10] that classification by the civil service commission was quasi-judicial in character was expressly overruled in *People* ex rel. *Schan v. McWilliams,*[11] in which the court said that such determinations were not in any sense judicial. The function of a reviewing court is performed when it determines that there has been a fair hearing, with notice, and an opportunity to present the circumstances and arguments to the deciding body in a just and reasonable manner,[12] as was the situation in the subject case.[13]

The availability and scope of judicial review of an administrative action is to a great extent molded by the courts themselves, whether or not statutes define the judicial-administrative relation.[14] In the final analysis it is determined by the extent to which courts are willing to interfere with the working out by the agency of policies defined in the statute under which it operates.[15] It also depends upon the courts attitude toward the basic issue of policy involved rather than upon legalistic rules and doctrines.[16] This varies with the type of governmental power involved, or the nature of the function in issue, such as the administration of post offices, public lands, taxation, the civil service and others.[17]

Civil service classification, involving internal affairs of the government, should be reviewed by the courts only rarely, if at all. *Arthur B. Custy*

Adverse Possession—Burden of Proof—Presumption of a Hostile Claim

Plaintiff and defendant respectively owned the northeast and northwest quarters of a section. A survey resulted in a boundary dispute over a fifty-foot strip. The trial court found as facts: That defendant was the owner and had been in possession and actual occupation of the northwest quarter as tenant or owner for over twenty years. That during all of that time the defendant had farmed the strip of land here involved. Trial court held that defendant and his predecessors had failed to establish claim to the strip of land by adverse possession. Held: Affirmed. It could not be inferred from the facts that defendant's use of the land was under a claim of right

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[10]People *ex rel.* Sims v. Collier, 175 N.Y. 196, 67 N.E. 309 (1903).

[11]185 N.Y. 92, 77 N.E. 785 (1906).

[12]Gray v. Powell, 314 U.S. 402 (1941); McLeod v. Civil Service Commission of Jackson, 198 Miss. 721, 21 So.2d 916 (1945).

[13]In California Co. v. State Oil and Gas Board, 27 So.2d 542 (Miss. 1946), *sugg. of error overruled,* 27 So.2d 548 (Miss. 1946), the Mississippi Supreme Court, in passing on an oil well-spacing statute, which it declared was legislative in nature, said that it could determine only if there was substantial evidence to uphold the board's order; if the board had acted in an arbitrary or capricious manner; if the board was acting within its statutory authority; and if its action did not contravene a constitutional mandate.

[14]Rep. Att'y Gen. Committee on Administrative Procedure 75 (1947). In McLeod v. Civil Service Commission of Jackson, *supra* note 12, the Supreme Court of Mississippi in reviewing an appeal by a policeman, whose discharge by the Mayor and City Commissioners was affirmed by the circuit court, held that under the statute giving the right to a jury trial on a discharged employee's appeal to the circuit court from an order of the Civil Service Commission, motion for a jury trial was not necessary, since in the absence of waiver of right to it, it was error to try the case without a jury.

[15]14 Miss. L. J. 305 (1942).

[16]*Ibid.*

[17]22 Cornell L. Q. 516 (1937). In the subject case the court held that mandamus was not the proper remedy. The only remedy available to the plaintiff was certiorari.

hostile to the true owner, because the original occupancy may have been permissive. *Johnson v. Raddohl,* 32 N.W. 2d 860 (Minn., 1948).

The general rule applicable to cases of adverse possession is that the party claiming the protection of the statute of limitations has the burden of proving that it inures to his benefit.[1] Consequently, there is ample authority to support the proposition that the adverse claimant must prove his possession to be hostile.[2] In the absence of evidence expressly or impliedly evincing that the possession is of a hostile character, the possession is presumed sometimes to be in subordination to the legal title, because the law will not presume that the possessor does the wrong of disseising the true owner.[3]

However, there are a number of decisions which adhere to what would seem to be the modern doctrine that the exclusive possession and use of the land are presumed to be hostile, and it is not necessary to show affirmatively an intention to hold and claim the property in spite of the fact that the legal title may be in another.[4] The presumption, of course, is rebuttable and therefore serves only to shift the burden of going forward to the party asserting documentary title . The presumption of a hostile claim where the adverse occupant establishes open, visible, continuous, and unmolested use of the statutory period is given remarkable support in boundary disputes involving adverse possession.[5]

In Mississippi the direct application of the modern doctrine is illustrated by the case of *Itawamba County v. Sheffield.*[6] It also seems to be an underlying factor of many boundary disputes in which possession is made the controlling consideration in determining intent, although the question is not generally considered there from the point of view of burden of proof.[7]

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[1]9 WIGMORE, EVIDENCE § 2538 (3d ed. 1940); 2 JONES, EVIDENCE § 558 (2d ed. 1926).

[2]Lovejoy v. McKibben, 113 Miss. 369, 74 So. 281 (1917); Neal v. Newburger Co., 154 Miss. 691, 123 So. 861 (1929); Weeping Water v. Reed, 21 Neb. 261, 31 N.W. 797 (1887); Alexander v. Wheeler, 69 Ala. 332 (1881).

[3]Neal v. Newburger Co., 154 Miss. 679, 123 So. 861 (1929); Davis v. Bowmar, 55 Miss. 671 (1878); Davis v. Caldwell, 107 Ala. 526, 18 So. 103 (1894); Barrett v. Kelly, 131 Ala. 378, 30 So. 824 (1901); Wilson v. Hunter, 59 Ark. 626, 28 S.W. 419 (1894); Buchanan v. Nixon, 163 Tenn. 364, 43 S.W.2d 380 (1931); Stuart v. Meade, 119 Va. 753, 89 S.E. 866 (1916); Greathouse v. Linger, 18 W. Va. 220, 127 S.E. 31 (1925); Wiburg v. Stevenson, 134 Kan. 530, 7 P.2d 512 (1932); McDonald v. Fox, 20 Nev. 364, 22 P. 234 (1889).

[4]Itawamba County v. Sheffield, 195 Miss. 359, 13 So.2d 649 (1943); City of Rock Springs v. Strum, 39 Wyo. 494, 273 P. 908 (1929); Oveg v. Morrison, 142 Wis. 243, 125 N.W. 449 (1910); Hahn v. Keith, 170 Wis. 524, 174 N.W. 551 (1919); Skinner v. Skinner, 38 Neb. 756, 57 N.W. 534 (1894); Glantz v. Gabel, 66 Mont. 134, 212 P. 868 (1923); 9 WIGMORE, EVIDENCE, *op. cit. supra* note 1, § 2515.

[5]Oveg v. Morrison, *supra* note 4; City of Rock Springs v. Strum, *supra* note 4; Wollman v. Ruehle, 100 Wis. 31, 75 N.W. 425 (1898); Eldridge v. Kennnig, 129 N.Y. 625, 29 N.E. 1028 (1891); Rowland v. Williams, 23 Ore. 515, 32 P. 402 (1893); Hedges v. Pollard, 149 Mo. 216, 50 S.W. 889 (1899); Lemmons v. McKinney, 162 Mo. 525, 63 S.W. 92 (1901); Diers v. Peterson, 290 Mo. 249, 234 S.W. 792 (1921); Doe *ex dem.* Holt v. Adams, 121 Ala. 664, 25 So. 716 (1898).

[6]195 Miss. 359, 13 So.2d 649 (1943).

[7]Metcalfe v. McCutchen, 60 Miss. 145 (1882); Jones v. Gaddis, 67 Miss. 761, 7 So. 489 (1890); Crowder v. Neal, 100 Miss. 730, 57 So. 1 (1911); Greer v. Pickett, 127 Miss. 739, 90 So. 449 (1921); Schuler v. McGee, 127 Miss. 873, 90 So. 713 (1921); Evans v. Harrison, 130 Miss. 157, 93 So. 737 (1922); Louis Cohn & Bros. v. Peyton, 145 Miss. 261, 110 So. 509 (1926); Daniels v. Jordan, 161 Miss. 78, 134 So. 903 (1931).

Public interest in security of title is the theory of legislative action in fixing a definite period within which claims to land must be asserted. Thus it prohibits the making of illegal claims after the evidence necessary to defeat them has been lost. The demerit of the owner in not asserting his right, rather than the merit of the adverse claimant, is established as a bar to the right of the owner.[8] Where a prima facie case of adverse possession is otherwise made out, a presumption of hostile occupancy seems to be consistent with the theory of statutes of limitation. If so, the Minnesota court should have placed on the plaintiff the burden of going forward to show that the original occupancy was permissive.

Fred A. Carver

Bankruptcy—Corporate Reorganization—Claims of Attorneys For Compensation Under Contractual Agreement with Individual Stockholders—Exclusive Jurisdiction of Bankruptcy Court

Lawyers retained to represent committee of preferred stockholders in corporate reorganization proceeding under Chapter X of the National Bankruptcy Act proposed to withdraw because of the slight possibility of adequate compensation out of the bankrupt's estate. Induced by the agreement of four stockholders to put certain shares of stock in escrow and deliver it to them at the end of the reorganization proceeding, lawyers continued and created an estate by litigation. The stock in escrow was to be compensation for efforts directed toward creating an estate, in addition to that allowed by the bankruptcy court out of the bankrupt's estate for services rendered in the reorganization proceeding. The stockholders repudiated their agreement to make additional compensation. The lawyers were awarded compensation by the bankruptcy court, out of the bankrupt's estate, for their services in the reorganization proceeding. The court, however, refused to pass on their claim to the stock under the escrow agreement on the grounds that it did not have jurisdiction. The lawyers sued in the courts of New York for the delivery of the stock to them. The New York Court of Appeals held that exclusive jurisdiction was in the bankruptcy court, and that the state court was powerless to act.[1] On certiorari to the United States Supreme Court, Held: The bankruptcy court has exclusive jurisdiction to pass on and enforce all attorneys' fees in connection with corporate reorganization. This includes fees agreed upon by lawyers and individual stockholders, which are not chargeable to the bankrupt's estate. *Leiman v. Guttman*, 69 Sup. Ct. 371 (1949).

The Constitution gives Congress power to regulate matters of bankruptcy.[2] States are free to act in this field in the absence of federal enactments, or in areas not covered by federal statutes. Once Congress has legislated in any area of the bankruptcy field, the federal jurisdiction is exclusive.[3] Under Section 242 of the National Bankruptcy Act[4] it is well settled that the power of the bankruptcy

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[8] 4 Tiffany, Real Property § 1134 (3d ed. 1939).

[1] Leiman v. Guttman, 297 N.Y. 201, 78 N.E.2d 472 (1948).

[2] U. S. Const. Art. I, § 8.

[3] International Shoe Co. v. Pinkus, 278 U.S. 261 (1929).

[4] 52 Stat. 900 (1938), 11 U.S.C. § 642 (1946) provides: "The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not

court to fix reasonable fees to be paid out of the bankrupt's estate is exclusive.[5]

The principal case poses the question of whether or not there is also exclusive jurisdiction to pass on and enforce fees previously agreed upon by lawyers and individual stockholders, for valuable services rendered in connection with the reorganization, but which are not chargeable to the bankrupt's estate. In holding that such jurisdiction is exclusive, the court relied on Section 221 (4) of the Bankruptcy Act, which provides:

> The judge shall confirm a plan if satisfied that . . . . (4) All payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge. . .

Under the old Section 77B, it had been held that contingent fee contracts between the lawyer and committee, not compensable out of the bankrupt's estate, were subject to the approval of the bankruptcy court.[6] Such a contract and the lien created by it could be set aside by the bankruptcy court and compensation allowed on a quantum meruit basis. The legislative intent in amending this section unquestionably was to give the bankruptcy court more power to prevent the overreaching of lawyers.[7] The court therefore held that Section 221 (4) increased this supervisory power by giving that court exclusive jurisdiction to control all fees.

Admittedly, one purpose of this section is to prevent the charging of excessive fees by lawyers. A strong dissent in the principal case contended that the purpose was being misconstrued here to allow the client to snare the lawyer. But this power to set aside a contract and allow compensation on a quantum meruit basis is not surprising in view of the New York law which gives the client a right to dismiss his lawyer before the services contracted for are fully performed, and to be liable, not on the contract or for damages, but on a quantum meruit basis for services rendered.[8] The bankruptcy court is given the power to do, after the services are fully performed, what the client himself can do in most jurisdictions at any time prior to complete performance of the contract.

If state courts were allowed to fix, approve or enforce fees in matters related to corporate reorganization, such fees would be subject to the approval of the federal judge under Section 221 (4) before he could approve the reorganization plan. If he did not agree with the judgment of the state court, he

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accepted by the creditors and stockholders or finally confirmed by the judge . . . by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission."

[5]Woods v. City National Bank & Trust Co., 321 U.S. 262 (1941), Brown v. Gerdes, 321 U.S. 178 (1943).

[6]*Re.* McCrory Stores Corp., 91 F.2d 947 (C.C.A. 2d 1937).

[7]PROTECTIVE COMMITTEE REPORT, Securities and Exchange Commission, part I, pp642, 644-647 (1937), as quoted in court footnote no. 6.

[8]Martin v. Camp, 219 N.Y. 170, 114 N.E. 46 (1916).

would be faced with the difficult choice of upsetting the finality of that judgment, or of allowing, through comity, a compensation which he would not have approved in his own court.

The Supreme Court suggested that the attorneys apply to the bankruptcy court for additional compensation under the escrow agreement. The effect is to require that court to scrutinize and regulate all attorneys' fees directly or indirectly connected with a reorganization proceeding.

Fred M. Bush, Jr.

Constitutional Law—California Miscegenation Statutes Void Because Violation of Equal Protection of Laws Clause of United States Constitution

In a mandamus proceeding, petitioners sought to compel the county clerk of Los Angeles County to issue them a certificate of registry and a license to marry. Respondent refused to issue the certificate and license because such action would be a violation of California's miscegenation statutes.[1] Held: The statutes prohibiting the marriage of a white person with a negro violate the equal protection clause of the United States Constitution.[2] *Perez v. Lippold,* 198 P.2d 17 (Cal. 1948).

The decision of the California Supreme Court in the instant case[3] is the first decision holding a miscegenetic marriage law invalid.[4] Twenty-nine states in addition to California have similar laws, and six of these states have constitutional enactments prohibiting their legislatures from passing any law legalizing marriage between white persons and negroes or mulattoes.[5]

The view taken by Justice Traynor in writing the majority opinion was that marriage is a basic civil right of man, and while the regulation of marriage is considered a proper function of the state, this miscegenation law was discriminatory, irrational, and unconstitutional. The reason for this conclusion was based on the theory that the regulation was too vague and uncertain and that the "due process clause" of the Fourteenth Amendment encompassed the provision of the First Amendment protecting the free exercise of religion.

Justice Carter concurred in the decision on the grounds that this type of regulation of the right to marry was unreasonable because it is a classification not based on provable facts, and no longer in accord with the public policy of the State of California.

Justice Edmonds agreed with the conclusion of the court on what he termed a "broader ground" than that the challenged statutes were discriminatory and irrational. Justice Edmonds felt that the validity of the statute depended on the existence of a "clear and present danger" to the public welfare.

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[1]Cal. Civil Code § § 60, 69, 69a (1872).
[2]U.S. Const. Amend. XIV, § 1.
[3]A four to three decision.
[4]36 Am. Jur. 452. "It is considered as well settled that although miscegenation statutes have been persistently attacked on the ground that they are violative of the United States Constitution, they nevertheless constitute a proper exercise of the power of each state to control its own citizens."
[5]Renter, Race Mixture 82 (1931).

Justice Shenk, in his dissenting opinion concurred in by Justices Schauer and Spence, based his reasoning on the principle of stare decisis[6] and the fact that the law had a rational basis, since it bore a substantial relationship to the health, safety, morals, and general welfare of the people of California. Justice Shenk reasoned that where legislative action is within the scope of the police power, fairly debatable questions as to the reasonableness and wisdom of such action are not for the determination of the courts, but for the determination of the legislative body.

The reasoning of the dissent seems to be based upon the sound principle that the State has a broad discretion in classification, when exercising its power of regulation to protect public health, morals, and welfare.[7]

The federal courts have uniformly sustained the validity of miscegenetic marriage laws.[8] These decisions are based on the grounds that the control of marriage is control of a domestic relation having to do with the morals and civilization of the people,[9] affects in a vital manner public welfare,[10] and may be controlled by the policy of the state as reflected by the legislature.[11]

Under the test laid down by the United States Supreme Court in *Plessy v. Ferguson*,[12] the reasonableness of the regulation is the decisive factor. It would seem, from the fact that the decision in the instant case was made by the California Supreme Court with a division of four to three, that there is enough doubt in the minds of reasonable men to require the court to allow the judgment of the legislature as to the public policy of the state to stand.

The importance of the instant decision to the people of Mississippi is apparent. The Constitution of Mississippi states that "the marriage of a white person with a negro or mulatto or person who shall have one-eighth or more of negro blood, shall be unlawful and void."[13] A statute of the State[14] repeats the prohibition, declaring such marriages void.

When this decision[15] is taken to the United States Supreme Court on certiorari,[16] the action by that Court will be of importance to citizens of Mississippi and the South.

Charles B. Henley

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[6]Justice Shenk's research did not disclose a single case where a miscegenetic marriage law had been declared invalid.

[7]Borden's Farm Products Co. v. Baldwin, 293 U.S. 194 (1934).

[8]Stevens v. United States, 146 F.2d 120 (C.C.A. 10th 1944); Maynard v. Hill 125 U.S. 190 (1888); Pace v. Alabama, 106 U.S. 58 (1883); State v. Tutty, 41 F. 753, (S.D. Ga. 1890).

[9]Stevens v. United States, *supra* note 8.

[10]Maynard v. Hill, *supra* note 8.

[11]State v. Tutty, *supra* note 8.

[12]Plessy v. Ferguson, 163 U.S. 537 (1896).

[13]Miss. Const., § 263.

[14]Miss. Code Ann. § 459 (1942).

[15]The Court in the instant case did not base its decision upon the State, but rather the Federal Constitution.

[16]According to a letter dated November 22, 1948, received by the writer of this comment from Mr. Harold W. Kennedy, the Los Angeles County Counsel, an application for a writ of certiorari from the United States Supreme Court will be made.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—POLICE POWER OF STATE TO CLASSIFY OWNERSHIP OF LIQUOR ESTABLISHMENTS ACCORDING TO SEX

A Michigan statute[1] provided for the licensing of bartenders in cities of 50,000 population or over. It further provided that no female be so licensed unless she be the "wife or daughter of the male owner" of a licensed liquor establishment. Plaintiffs are female bartenders and bar owners. They claim unreasonable discrimination as a violation of the equal protection clause of the Fourteenth Amendment. HELD: The classification as set up in the statute was a reasonable one. There was no denial of equal protection. *Goesaert v. Cleary,* 69 Sup. Ct. 198 (1949).

Discrimination against women in matters related to intoxicating liquors has been upheld consistently by the courts. There is a continuous line of decisions in accord with the instant case, extending from the last half of the past century.[2] This discrimination has been upheld when directed against the female sex in general,[3] or toward a particular class within the sex.[4] Particularly has such classification within the sex been upheld where the legislature attempted to control the employment of women as waitresses[5] or as barmaids.[6] In many such cases the legislature has granted exemption to a female licensee,[7] or to the wife or daughter of a male licensee.[8]

There are three primary reasons given for upholding the constitutionality of such discrimination. The first of these is that class discrimination is no violation of equal protection, so long as it has its basis in reason.[9] Though by no means confined to the licensing of liquor dealers,[10] this proposition is necessarily the basis from which to uphold any discriminatory liquor measure. Second to this is the more specific proposition that the liquor business is not a right but a privilege. Consequently, the legislature may establish any conditions precedent to the exercise of that privilege, so long as such conditions are reasonable.[11] It will be observed that the force given to both these principles has its basis in the interpretation the courts give to the word "reasonable."

The third controlling proposition arises as a result of this necessarily subjective approach by the courts. This is that the moral and social problems connected with liquor are such that the courts will give the legislature wide latitude in dealing with them. Thus, the Michigan Supreme Court, in another case construing the same statute as in the subject case, said: "The regulation and control of traffic in alcoholic liquor, particularly with reference to those who act as bartenders, is within the police power of the legislature."[12] Added force is given to this argument when the statute under consideration purports to regulate the presence of women in and around liquor

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[1]Pub. Acts Mich. 1945, No. 133 § 19a.
[2]Walter v. Commonwealth, 88 Pa. 137, 32 Am. Rep. 429 (1878).
[3]People v. Case, 153 Mich. 98, 116 N.W. 558, (1908).
[4]People v. Jemnez, 49 Cal.2d 739, 121 P.2d 543 (1942).
[5]Cronin v. Adams, 192 U.S. 108 (1904).
[6]Fitzpatrick v. Liquor Control Commission, 316 Mich. 83, 25 N.W.2d 118 (1946).
[7]Cal. Gen. Laws 1937, Act 3796, § 56.4.
[8]Pub. Acts Mich., *supra* note 1.
[9]DeRidder v. Mangano, 186 La. 129, 171 So. 826 (1936).
[10]Foster v. Police Comm'rs, 102 Cal. 483, 37 P. 763, (1894).
[11]People v. Jemnez, *supra* note 4.
[12]Fitzpatrick v. Liquor Control Commission, *supra* note 6.
[13]Hoboken v. Goodman, 68 N. J. Law 217, 51 A. 1092 (1902).

establishments.[13] In such cases the statute's validity is in no way dependent on the effectiveness of its actual operation. This point is made by the Court in the instant case.

It is clear that the above stated reasons have their basis in public policy.[14] A combination of women and liquor, the courts say, is conducive to immorality. It is within the police power of the state to protect the public morals. Therefore, the legislature may exercise complete control over this subject.[15]

Prior to 1947, a California decision was the only case on record which held contra to the established rule.[16] This opinion has since been disapproved or overruled in other California decisions.[17] However, as the status of women in society has more nearly approached that of men, the courts have exhibited an increasing tendency to dissent from the foregoing principles. In 1947, the Florida court, in the case of *Brown v. Foley*,[18] held that a city ordinance prohibiting females from serving as barmaids was void. Thus this court departed from the established view which it had formerly held.[19] Although at the present time Florida is the only jurisdiction not in accord with the majority, the force and number of dissenting opinions has increased.[20] These opinions are based on the proposition that in the light of present day conditions, discrimination because of sex in matters related to liquor is unreasonable. Such is the basis of the dissenting opinion in the instant case.

It is submitted that the present prevailing rule is the sound one. There is no reason for paying homage to equality of the sexes when concerned with a matter in which an actual difference exists. In answer to arguments concerning the emancipation of women, it has been said: "The extent to which the legislature may be influenced by a newer conception . . . as to the rights of women in employment and in social life, and particularly to act as bartenders in licensed liquor establishments, is for the legislature, and it only, to decide."[21] Strict adherence to the principles reflected by this statement is the best assurance of justice and practicability in future decisions. *Robert D. Patterson*

Contracts—Interpretation of Lease as a Whole Gives Preference to One Clause over Another

Lessee was given an option by the lease to purchase the leased premises for $12,000. This option was good for the life of the lease, and required that thirty days' notice of its exercise be given.[1] A purchase refusal clause stated that if the lessor

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[14]*Re* Carragher, 149 Iowa 225, 128 N.W. 325 (1910).

[15]State v. Considine, 16 Wash. 358, 47 P. 755 (1897).

[16]*Re* Maguire, 57 Cal. 604, 40 Am. Rep. 125 (1881).

[17]*Ex parte* Hayes, 98 Cal. 555, 33 P. 337, (1893); Foster v. Police Comm'rs, *supra* note 10; *Ex parte* Felchin, 96 Cal. 360, 31 P. 224 (1892); People v. Jemnez, *supra* note 4.

[18]158 Fla. 734, 29 So.2d 870 (1947).

[19]Nelson v. State, 157 Fla. 412, 26 So.2d 60 (1946).

[20]Goesaert v. Cleary, 74 F. Supp. 735 (E.D. Mich. 1947).

[21]Fitzpatrick v. Liquor Control Commission, *supra* note 6.

[1]"Purchase Option: . . . Lessors hereby give and grant to Lessee the exclusive option and privilege of purchasing the demised premises . . . at any time during the original or extended term of this lease for the sum of . . . $12,000 in cash, provided Lessee shall give Lessors not less than thirty (30) days' notice of Lessee's exercise of this option. . . .

"The giving of such notice by Lessee shall fix and determine the right of Lessee to purchase said premises and property and the obligation of Lessors to sell the

should get an offer for the premises from a third party, the lessee would have refusal of the property on the same terms.[2] Lessee served notice of the exercise of the option. Four days later lessor notified lessee of a third party's offer of $17,500, and tendered him the refusal of this offer under the purchase refusal clause. HELD: After lessee had accepted the offer to purchase by giving notice, all rights of lessors under the purchase refusal clause ceased to exist. *Sinclair Refining Company v. Allbritton,* 218 S.W. 2d 185 (Tex. 1949), *rehearing denied,* 218 S.W.2d 185 (Tex. 1949), *reversing,* 213 S.W.2d 139 (Tex. Civ. App. 1948).

Separately, either of these clauses seems to define the rights of the parties. Yet when both are examined they conflict. A primary rule in the interpretation of contracts is that consideration must be given to the instrument as a whole, and a reasonable meaning and harmonious effect given to all related provisions, wherever that can be done.[3]

Two possible interpretations are conceived and were available to the court. The giving of notice created a contract without condition subsequent and the rights of the parties under the purchase refusal clause then terminated. It was equivalent to acceptance of an offer.

Particular clauses and terms must be considered in connection with the remainder of the lease,[4] and an interpretation which gives effect to the apparent purpose of the contract will be favored.[5] Here the option was inserted for the benefit of the lessee, and the court thought that it must be construed with that purpose in view.[6] All parts of the contract were examined in order to determine what effect each had upon the questioned clauses.[7] The provision for the thirty days' notice was said not to mean that two notices had to be given, but that the relationship of vendor and vendee was established at the time of the first notice.[8]

Since the lease had thirty days to run after the notice was given and the purchase refusal clause read, "if at any time during the term of this lease. . ., " it is arguable that this provision could be invoked after notice was given and during the remaining thirty days of the lease. This would make the contract conditional upon the lessor's not receiving a higher offer during the thirty days of the lease.[9]

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same, and a reasonable time thereafter will be allowed Lessors to furnish abstract of title and to cure defects. . . ."

[2]"Purchase Refusal: In the event Lessors shall receive from a third party at any time during the term of this lease a bona fide offer to purchase the leased premises, and shall decide to sell the same for the amount named in said offer, Lessors shall promptly give to Lessee written notice of the terms of such offer and Lessors' willingness to sell for the price offered, and Lessee shall have the option and privilege of purchasing said premises at said price and shall notify Lessors in writing. . . ."

[3]Sun Oil Co. v. Burns, 84 S.W.2d 444 (Tex. Civ. App. 1935).

[4]State Elevator Co. v. Farmer's Elevator Co., 95 Mont. 557, 27 P.2d 743 (1933); Cities Service Gas Co. v. Kelly-Dempsey & Co., 27 F. Supp. 547 (N.D. Okla. 1939), *reversed,* 111 F.2d 247 (C.C.A. 10th 1939); 51 C.J.S. 853, § 232 (e).

[5]Marx v. American Malting Co., 169 F. 582, 584 (C.C.A. 6th 1909).

[6]Barnhart v. Stern, 182 Wis. 197, 196 N.W. 245 (1923).

[7]The court applied the maxim *noscitur a sociis.* 3 WILLISTON, CONTRACTS § 618 (Rev. ed. 1936).

[8]*Accord,* Mason v. Payne, 47 Mo. 517 (1871); 51 C.J.S. 639, 640; 2 THOMPSON, REAL PROPERTY § 1295 (Per. ed. 1924).

[9]Sinclair Refining Co. v. Allbriton, 213 S.W.2d 139 (Tex. 1948), reversed by the principal case; *cf,* City of El Paso v. Long, 209 S.W.2d 950 (Tex. Civ. App. 1947). The contract to sell was conditioned on tender of the purchase money even though notice of exercising the option had been given according to the lease.

Additional reasons to support this latter position were urged upon the court. The lessee drew the contract. If there is any doubt concerning its meaning, it was suggested that doubt must be resolved against lessee.[10] When contracts are optional in respect to one party, they are strictly interpreted in favor of the party bound and against the party that is not bound.[11] And, of course, each and every part of the contract should be given effect in so far as the same may be determined by the language used.[12] This might imply that in construing the instrument as a whole each provision shuold be given equal weight, and qualifying the purchase option by the purchase refusal clause would give effect to both provisions.[13] Yet the foregoing are simply logical devices for assisting the court in ascertaining the intention of the parties or a fair interpretation of the terms of the contract.

Regarding the purchase refusal clause as merely a supplement of the option to purchase appears to be the better construction. In a recent Rhode Island case[14] the court stated that a purchase refusal provision, which was similar to the present one, should not be construed in such a way as to limit or detract from the lessee's rights under the option. Since the primary purpose of both clauses is to give lessee the privilege of purchasing the premises, it should not be conditioned by other provisions, unless expressly stated to be of that nature. The principal case demonstrates that, in drafting and approving lease contracts with such clauses, the practitioner should be extremely careful in preparing option and refusal clauses. A provision in the purchase refusal clause which would call for its termination upon giving notice that the option to purchase had been accepted would eliminate unquestionably any ambiguity.

John Marshall Grower

Federal Procedure—Change of Venue—Forum Non Conveniens

All plaintiffs were employed by the defendant railroad. One plaintiff was injured in an accident which took place in Texas. The others were injured in similar accidents in Illinois and Oklahoma. All filed suit against the defendant in the Federal District Court of Minnesota pursuant to the venue statute of the Federal Employers' Liability Act.[1] Defendant moved to transfer venue to places of residence of plaintiffs under the change of venue provisions of the new Federal Judicial Code.[2] Held: Change of venue allowed. The phrase, "any civil action," as used in the Judicial

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[10]Powers v. Sunylan Co., 25 S.W.2d 809 (Tex. Civ. App. 1930); Soldano v. Holmes, 60 A.2d 535 (1948).

[11]Pyrate Corp. v. Sorensen, 44 F.2d 323 (C.C.A. 9th 1930).

[12]Barnhart v. Stern, 182 Wis. 197, 196 N.W. 245 (1923); Brooks & Co. v. North Carolina Public Service Co., 37 F.2d 220 (C.C.A. 4th 1930), *affirming*, 32 F.2d 800 (M.D. N.C. 1929), *cert denied*, 281 U.S. 741 (1930).

[13]Leon v. Gulf Production Co., 35 S.W.2d 1101 (Tex. Civ. App. 1931); Nevels v. Harris, 102 S.W.2d 1046 (Tex Civ. App. 1937).

[14]Butler v. Richardson, 60 A.2d 718 (R.I. 1948).

[1]"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business. . . ." 36 Stat. 291 (1910), as amended, 36 Stat. 1167 (1911), 45 U.S.C. § 56, as amended, 62 Stat. 989, 45 U.S.C. § 56 (Supp. 1948).

[2]"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 62 Stat. 992 (1948), 28 U.S.C. 1404(a) (1948).

Code applies to an action brought under the F.E.L.A., and the doctrine of *forum non conveniens* is applicable. *Hayes v. Chicago,* 79 F. Supp. 821 (D. Minn. 1948).[3]

Federal courts had recognized the doctrine of *forum non conveniens*[4] prior to the enactment of Section 1404(a) of the Judicial Code, but in cases where a federal statute gave plaintiff the privilege of selecting the forum wherein he wished to try his suit, the rule was not applied.[5] It was held that an action properly brought under the Federal Employers' Liability Act in a state court could not be enjoined by an injunction of the courts of a sister state wherein the action might have been brought.[6] Nor could a federal district court transfer such a case from its venue to a more convenient venue.[7]

This resulted in apparent inequities and abuses. In several cases the courts announced that while abhorring the expense, delay, undue burden on interstate commerce, and vexatious nature of plaintiff's suing in a court far from the scene of the accident, the correction lay not in the courts but in the Congress.[8]

It would appear then that the new section corrects the abuses and inequities existing under the F.E.L.A. However, since the date of its taking effect, one court has held that the venue provisions of the F.E.L.A. were not affected by Section 1404(a).[9] The Court reasoned in this manner: The mention in the reviser's notes to Section 1404(a) of a case[10] decrying the inequities of Section 6 of the F.E.L.A. did not show that Congress intended "by said section to deprive an employee of . . . the special and substantive right of venue granted him. . . ." Nor did Congress' refusal to pass the Jennings Bill,[11] considered at the time Section 1404(a) was enacted, show that Congress intended the new section to have the effect of destroying plaintiff's rights under the Employers' Liability Act. Also, the new section was meant to apply only to cases enumerated in the Judicial Code (of which Section 1404(a) is a part), and not to those situations covered by venue provisions and privileges created by statute, except those specifically repealed by the new Code.[12] The court also pointed to testimony of several members of Congress which tends to indicate that no such changes were contemplated by Congress in passing the new section.

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[3]Nunn v. Chicago, Milwaukee, St. Paul R. R., 80 F. Supp. 745 (S.D. N.Y. 1948); Scott v. New York Central R. R., 81 F. Supp. 815 (N.D. Ill. 1948); White v. Thompson, 80 F. Supp. 411 (N.D. Ill. 1948).

[4]"The rule of *forum non conveniens* is an equitable one embracing the discretionary power of a court to decline to exercise jurisdiction which it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere." Leet v. Union Pacific R. R., 25 Cal.2d 605, 155 P.2d 42, 44 (1944); WORDS AND PHRASES 64 *et seq.* (Supp. 1948).

[5]Gulf Oil Corp v. Gilbert, 330 U.S. 502 (1947); United States v. National City Lines, 334 U.S. 573 (1948), but *forum non conveniens* held applicable on rehearing, 80 F. Supp. 734 (S.D. Cal. 1948); Leet v. Union Pac. R. R., *supra* note 5.

[6]Miles v. Illinois Central R. R., 315 U.S. 698 (1942); See Note, 146 A.L.R. 1118 (1943).

[7]Baltimore & Ohio R. R. v. Kepner, 314 U.S. 44 (1941); See Note, 136 A.L.R. 1232 (1942).

[8]Baltimore & Ohio R. R. v. Kepner, *supra* note 7.

[9]Padcarella v. New York Central R.R., 81 F. Supp. 95 (E.D. N.Y. 1948).

[10]Baltimore & Ohio R. R. v. Kepner, *supra* note 7. Mention is found at 28 U.S.C. CONG. SERV. 1853.

[11]This bill provided that Section 6, F.E.L.A., 45 U.S.C. § 56 (Supp. 1948), be amended by eliminating the broad power of the plaintiff to select the forum in which the action would be tried.

[12]Revision Title 28, U.S.C. CONG. SERV. § 39. The Pascarella case, *supra* note 9, discusses this point.

The United States Supreme Court has not yet passed on this question. A single decision holds contra to the principal case. It would seem that Section 1404(a) was intended by Congress to enact into statutory law the doctrine of *forum non conveniens*. Certainly it appears to be more equitable to allow the court to transfer those cases in which the venue chosen is manifestly unfair and hampers justice. The two acts are not inconsistent. One function of the section is to correct by change of venue inequities arising under the Employers' Liability Act.

Wayne G. Williams

Master and Servant—Bus Company Liable for Battery Committed by Driver in Argument over Right of Way

Defendant company's driver stopped his bus near the center of the street at a city intersection, intending to make a right turn. Plaintiff, approaching from the same direction, drove his car between the bus and the right curb. When the traffic light turned green, the driver proceeded to make the turn, but stopped when the plaintiff shouted that he was going to hit his car. The driver alighted from the bus, and during an argument over the right of way, struck plaintiff in the face. Held: Although the actions of the driver constituted a wilful tort, the master was liable, since the jury properly determined that it was within the scope of employment. *Tri-State Coach Corporation v. Walsh,* 188 Va. 299, 49 S. E.2d 363 (1948).

In early cases the master was not held liable for the wilful torts of his servant[1] unless he had authorized them. Such acts were considered as *per se* outside the scope of employment. The general rule today, however, places the intentional acts of a servant on the same basis as his negligent acts, and the master is liable if they were done in the scope and course of employment.[2]

The early English case of *Limpus v. London General Omnibus Company*[3] upheld the trial court's submitting to the jury the question of whether a wilful tort, committed by a driver while competing for precedence of the highway, was within the scope of employment.

Within the last half-century the decisions in this country have shifted from one extreme to the other on very similar fact situations. In *Rudgeair v. Reading Traction Company*[4] the court held as a matter of law that the servant was not acting in the scope of his employment. Here a motorman jumped off the car of defendant company and battered plaintiff, whose wagon was obstructing the track. This principle was applied in *Plotkin v. Northland Transportation Company*[5] where defendant's

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[1] *E.g.,* Wright v. J. & S. Wilcox, 19 Wend. 343 (N.Y. 1838).

[2] *E.g.,* Davis v. Merrill, 133 Va. 69, 112 S. E. 628 (1922). Tri-State Coach Corp. v. Walsh, 188 Va. 299, 49 S. E.2d 363 (1948); Houston Transit Co. v. Felder, 208 S. W.2d 880 (Texas 1947), *affirming* 203 S. W.2d 831 (Texas Civ. App. 1947); Fields v. Sanders, 29 Cal.2d 834, 180 P.2d 684 (1947). The most recent case is that of Joyce v. Southern Bus Lines, 172 F.2d 432 (C. C. A. 5th 1949), which originated in the United States District Court for the Southern District of Mississippi. It is inferable from the facts that the plaintiff's interference with the driver's authorized acts was past interference. See note 6 *infra.*

[3] 1 H. & C. 526, 158 Eng. Rep. 993 (Ex. 1862).

[4] 180 Pa. St. 333, 36 A. 859 (1897).

[5] 204 Minn. 422, 283 N. W. 758 (1939); *accord,* Wood v. Southeastern Greyhound Lines, 302 Ky. 110, 194 S. W.2d 81 (1946); Shipp v. Georgia Power Co., 195 Ga. 446, 24 S. E.2d 764 (1942), *reversing* 67 Ga. App. 867, 21 S. E.2d 458 (1942).

bus driver, after having difficulty in passing plaintiff, stopped and assaulted him during the ensuing argument.[6] To render the master liable it was not enough that the battery would not have occurred except for the employment, or that it was due to anger arising from the performance of the servant's duties,[7] or that the battery might advance or be intended to advance the master's business or prevent future annoyance.[8] It was held that, as a matter of law, the acts of the driver were not in the scope of employment.[9]

The act committed must be of the same general nature as that authorized.[10] Yet in *Houston Transport Company v. Felder*[11] it was said that there was no error in submitting to the jury the question of whether the driver's battery on the plaintiff was within the scope of employment, when it was committed after a collision of the two vehicles. Where the servant begins a quarrel while acting within the scope of his authority, and immediately follows it with a violent assault, the master is liable, since the courts will not undertake to say when in the course of the assault he ceased to act as servant and began to act upon his own responsibility.[12]

In a recent California case[13] the court went to the opposite extreme from the early cases when it was held that the trial court properly determined as a matter of law that an assault was in the scope of the driver's employment. The assault was committed during an altercation after defendant's truck had sideswiped plaintiff's car, which raised a statutory duty to exchange information as to identity.[14] That the act was not done to further the master's interest or was not reasonably foreseeable by the master was not decisive. The court stated that it could not look to the nature of the act alone, for the proper inquiry was whether it was committed in the course of a series of acts authorized by the master.[15]

The principle most applicable to these cases seems to be that a master is liable for the acts of his servant which are committed during the employment with some intent to further the master's business. When this intent, real or constructive, is lacking, the majority of the courts consider the acts outside the scope of employment. The nature of the employment, of the act done, and of the annoyance are guides in de-

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[6]The court stated that the plaintiff's action was past interference, citing RESTATEMENT, AGENCY § 245, illustration 7, comment *d* (1933), with approval. The court said by way of dicta that if the interference had been during the time of the assault, the master would have been liable. Likewise, the court in the principal case stated that if the driver had successfully completed the turn before the assault, the master would not have been liable. RESTATEMENT, AGENCY § 245, illustration 8, comment d (1933).

[7]Plotkin v. Northland Transportation Co., *supra* note 5; Plumer v. Southern Bell Tel. Co., 58 Ga. App. 622, 199 S. E. 35 (1938); *cf.* Southeastern Gryehound Lines v. Hardin's Adm'r., 281 Ky. 345, 136 S. W.2d 42 (1940).

[8]Plotkin v. Northland Transportation Co., *supra* note 5. *But cf.* Interstate Co. v. McDaniel, 178 Miss. 276, 173 So. 165 (1937).

[9]A dissenting judge could not agree with the distinction between a wrong committed after passing the vehicle and one committed while passing.

[10]*Contra:* Davis v. Merrill, *supra* note 2.

[11]208 S. W.2d 880 (Texas 1947), *affirming* 203 S. W.2d 831 (Texas Civ. App. 1947).

[12]*Cf.* Interstate Co. v. McDaniel, *supra* note 8.

[13]Fields v. Sanders, 29 Cal.2d 834, 180 P.2d 684 (1947).

[14]*Contra:* Plumer v. Southern Bell Tel. Co., *supra* note 7.

[15]The court maintained that to withhold from the jury the determination of the scope of employment was proper, since reasonable men could not differ under the facts of the case.

termining this intent. Due to the nature of this element, it appears that the court in the principal case followed the most logical course in submitting these considerations to the jury under proper instructions.

William O. Carter

National Service Life Insurance—Change of Beneficiary

Insured, under a National Service Life Insurance Policy, wrote a letter to his brother while serving overseas in which he made the statement, "Speaking of Mother Bud I did change my insurance and if anyone gets it Mom will get it all." Later insured was killed in action. Veterans Administration records show that his wife was the beneficiary. There was nothing other than the letter to indicate a change from the wife to the mother. Held: Deceased had done all that he could reasonably do to comply with the change of beneficiary provisions of the policy. He adequately manifested an intent to make the transfer. *Gann v. Meek,* 165 F.2d 857 (C.C.A. 5th 1948).

Under the National Service Life Insurance Act of 1940, the insured has the right to change the beneficiary without notice to the previous beneficiary, subject to regulations.[1] The rule governing the method of doing this is set out in the Regulations of the Veterans Administration.[2] It provides for notice in writing to the Veterans Administration by the insured or his agent.

The courts have been lenient in construing letters and various personnel service reports to parties other than the Veterans Administration as sufficient notice of change of beneficiary. Some opinions have held that the courts will brush aside technicalities to give effect to the intention of the insured.[3] Others were based on the fact that the express wish of the serviceman should control as to the party entitled to the benefits.[4] Some courts have not gone as far in accepting letters, to others than the insurer, as sufficient to change a beneficiary. They have said that the insured did not do all that he could have done to effectuate a change.[5]

There are a number of cases opposed to the reasoning that the intention of the insured alone is sufficient to change the beneficiary. They say that the intention must be coupled with some affirmative act that the insured believed changed the

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[1]National Service Life Insurance Act (1940), 38 U.S.C.A. 691 (1940).

[2]"A change of beneficiary to be effective must be made by notice in writing signed by the insured and forwarded to the Veterans Administration by the insured or his agent, and must contain sufficient information to identify the insured. Whenever practicable such notices shall be given on blanks prescribed by the Veterans Administration." Veterans Administration Regulations, Soldiers' and Sailors' Civil Relief Act Amendment, 1942, No. 10.3447, Fed. Reg. 8363 (1942).

[3]Foster v. Winingham, 165 F.2d 46 (C.C.A. 10th 1948); Mitchell v. United States, 165 F.2d 758 (C.C.A. 5th 1948); Walker v. United States, 70 F. Supp. 422 (S.D. Tex. 1947); Claffy v. Forbes, 280 F. 233 (W.D. Wash. 1922).

[4]Ambrose v. United States, 15 F.2d 52 (C.C.A. 1st 1926); Lincoln Bank and Trust Co. v. United States, 71 F.Supp 745 (W.D. Ky. 1947); Egleston v. United States, 71 F. Supp. 114 (E.D. Ill. 1947).

[5]Ramsay v. United States, 72 F. Supp. 613 (S.D. Fla. 1947); Kingston v. Hines, 13 F.2d 406 (W.D. Mich. 1926).

beneficiary.[6] The letter to a party is evidence of intent, and the affirmative act is inferred from the effort of the serviceman to make an official change of beneficiary. Acts, such as placing the matter of change of beneficiary in the hands of company officers for action, or supplying information given on personnel data sheets naming the beneficiary have been held to be sufficient. Also, government insurance report forms not addressed to the Veterans Administration, and the obtaining of incorrect forms from company clerks have been held sufficient to meet the requirement of an affirmative act.[7] With such actions, the courts believe that the insured has done everything that he could reasonably be expected to do to accomplish the change.[8]

In the case under consideration, no affirmative act as set out in the decisions in the preceding paragraph can be found. The only evidence that the insured contemplated a change of beneficiary was in the letter to the brother. The letter could be indicative of an intent.

The determination of the intention of the insured seems to be of paramount importance. However, some courts, going further, do not follow the rule of intent plus an affirmative act as being necessary to meet the change of beneficiary requirement. They eliminate the latter and hold that once the intent has been ascertained, the wish of the deceased must be carried out.[9]

The principal case rules out those cases holding that all that is necessary to be determined is the intent of the insured, and that the court will carry it out.[10] The court thought that mere intention alone, no matter how strong, was not sufficient to change beneficiaries in an insurance policy. Yet the basis for the holding here was that insured had done all that he reasonably could do. In light of conditions at the time, the letter was held to be sufficient evidence to justify the finding that the

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[6]Mitchell v. United States, *supra* note 3; McKewen v. McKewen, 165 F.2d 761 (C.C.A. 5th 1948), *cert. denied,* 68 Sup. Ct. 1530 (1948); Johnson v. White, 39 F.2d 793 (C.C.A. 8th 1930); Citron v. United States, 69 F. Supp. 830 (D. D. C. 1947); Woods v. United States, 69 F. Supp. 760 (S.D. Ala. 1947); Senato v. United States, 78 F. Supp. 536 (S.D. N. Y. 1948); Flood v. United States, 78 F. Supp. 420 (D. N. J. 1948).

[7]In Bradley v. United States, 143 F.2d 573 (C.C.A. 10th 1944), *cert. denied,* 323 U.S. 793 (1945), the court held a Confidential Personal Report addressed to the United States Army Airport at a certain location, naming his wife beneficiary, only an intention to change the beneficiary. It is not an affirmative act. The court used these words: "Nothing can be legitimately inferred that the confidential report was intended for the use of the Veterans Administration or that its purpose was to change the beneficiary. It is not a notice of any kind or a direction that the name of the beneficiary be changed, and does not express or indicate even indirectly or inaptly a desire to have the beneficiary changed." The court in the principal case ruled out this case on the basis of no intent of the insured to change the beneficiary in spite of proven testimony of the wife that he would change the beneficiary. Decision seems opposite in the Bradley case to that reached in Mc Kewen v. Mc Kewen, *supra* note 6; Citron v. United States, *supra* note 6; Senato v. United States, *supra* note 6. For a discussion of Bradley v. United States as going counter to the weight of authority, *see* Cotter v. United States, 78 F. Supp. 495 (D.Md. 1948).

[8]Johnson v. White, *supra* note 6; Hartman v. United States, 78 F. Supp. 227 (W.D. Mo. 1948); Citron v. United States, *supra* note 6; Egleston v. United States, *supra* note 4.

[9]Foster v. Winingham, *supra* note 3; Lincoln Bank and Trust Co. v. United States, *supra* note 4; Ambrose v. United States, *supra* note 4; United States v. Tuebert, 57 F.2d 895 (E.D. N. Y. 1932).

[10]Foster v. Winingham et al., *supra* note 3; Ambrose v. United States, *supra* note 4; Lincoln Bank and Trust Co. v. United States, *supra* note 4.

insured had done all that he reasonably could do to effect a change. The factors considered by the court in reaching this conclusion were the affirmative statement of the insured that he did change the beneficiary and the lack of dependability of mail service.

The court made mention of the fact that the letter was almost a dying declaration. A period of approximately nine weeks elapsed between the writing of the letter and the death of the insured. The time element involved would defeat any inference that the letter was a dying declaration. The Veterans Administration Regulations contain a provision governing a last will and testament.[11] It provides that a change of beneficiary cannot be made by last will and testament.

As pointed out in the dissenting opinion, the matter of loss of mail was decided upon mere speculation and guess. Letters had been written regularly between the deceased and his family and had been delivered. This was borne out in a statement in the letter to the brother. There was no evidence that insured wrote any letter at all to the Veterans Administration, or took any step to change the beneficiary other than the letter to his brother. The letter is indicative of an intent to change the beneficiary, but fails to contribute the necessary affirmative act which the court said was necessary to accomplish a change of beneficiary.

Delbert Hosemann

Real Property—Delivery of Deed Evidenced by Recordation

Plaintiff wrote to his son, the defendant, who was absent in the army, expressing his intention to convey his homestead to him. Defendant answered, stating either that he did not want the land, or that plaintiff could do as he wished with it. Plaintiff and his wife then executed a deed to defendant for the land and had it recorded. Prior to defendant's return, plaintiff's wife burned the deed. Defendant returned and learned of the recordation of the deed. He then claimed and took possession of the homestead, moving in with plaintiff. Subsequently plaintiff sued to cancel the deed, claiming it had never been delivered or accepted. Held: Recordation of the deed was an effective delivery of it. Defendant's acts of claiming and taking possession upon discovery of the recorded deed were a sufficient mainfestation of his acceptance. *Wilbourn v. Wilbourn,* 37 So.2d 256 (Miss. 1948).

Manual delivery of a deed by the grantor to the grantee is not essential.[1] Other acts accompanied by the intention to pass the title from one to the other may be equally efficacious in establishing delivery.[2] The grantee need not accept the deed personally, or be present at the time of delivery, or ever come into its manual possession.[3]

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[11]Veterans Administration Regulations, Soldiers' and Sailors' Civil Relief Act Amendment, 1942, No. 10. 3446, 7 Fed. Reg. 8363 (1942) provides: "An original beneficiary designation may be made by last will and testament duly probated, but no change of beneficiary may be made by the last will and testament."

[1]Lee Hardware Co. v. Johnson, 132 Ark. 462, 201 S.W. 289 (1918); Smith v. Owens, 91 Fla. 995, 108 So. 891 (1926); Williams v. Dent, 233 Ala. 109, 170 So. 202 (1936).

[2]Alford v. Henderson, 237 Ala. 27, 185 So. 368 (1938); Lee Hardware Co. v. Johnson, *supra* note 1.

[3]Merrills v. Swift, 18 Conn. 257, 46 Am. Dec. 315 (1847); Wellborn v. Weaker, 17 Ga. 267, 63 Am. Dec. 235 (1855).

The intention of the parties, particularly the grantor, is an essential and controlling element of delivery.[4] It may be inferred from the grantor's words and acts, and from the circumstances preceding, attending, and subsequent to the execution of the instrument.[5]

A general rule is that the due execution, acknowledgment and recording of a deed is prima facie evidence of its delivery.[6] The courts say that it is difficult to see any object in leaving the instrument for record unless it was intended by the grantor that it should operate as a conveyance.[7]

Further, a deed duly executed, acknowledged and recorded is prima facie evidence of its acceptance, at least where a beneficial interest is conferred.[8] Acceptance by the grantee will be presumed until he has signified his rejection.[9]

While the presumption of delivery arising from the execution, acknowledgment and recordation of a deed may be rebutted, clear and convincing evidence is required to overcome this presumption.[10] The burden is on the grantor to show that he did not intend the instrument to operate as a conveyance.[11]

The case of *Mitchell v. Ryan*[12] clearly expresses the general rule regarding delivery of deeds. When the grantor sent the deed to the recorder to be registered, with unqualified instructions to record it, he evidenced his intention to convey at that

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[4]Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369 (1879); Chambers v. Chambers, 227 Mo. 262, 127 S.W. 86 (1910); Hardin v. Kazee, 238 Ky. 526, 38 S.W.2d 438 (1931).

[5]Lee Hardware Co. v. Johnson, *supra* note 1; Harkreader v. Clayton, *supra* note 4; Napier v. Elliott, 146 Ala. 213, 40 So.752 (1906).

[6]Powell v. Powell, 217 Ala. 287, 116 So. 139 (1928); Reynolds v. Balding, 183 Ark. 397, 36 S.W.2d 402 (1931); Smith v. Owens, *supra* note 1; Levy v. Cox, 22 Fla. 546 (1886); Hiddleson v. Cahoon, 37 Idaho 142, 214 P. 1042 (1923); Campbell v. Campbell, 368 Ill. 202, 13 N.E.2d 265 (1938); Pure Oil Co. v. Baylor, 388 Ill. 331, 58 N.E.2d 26 (1944); Wainwright Trust Co. v. Stern, 72 Ind. App. 116, 125 N.E. 578 (1920); Hodgson v. Dorsey, 230 Iowa 730, 298 N.W. 895 (1941); Middleton v. Ball, 182 Ky. 163, 206 S.W. 275 (1918); Chambers v. Chambers, *supra* note 4; Deer v. King, 30 S.W.2d 980 (Mo. Sup. 1930); Beauchamp v. McLaughlin, 200 Miss. 83, 25 So.2d 771 (1946); Neblett v. Neblett, 70 Miss. 572, 12 So. 598 (1893); Chapman v. Kellogg, 252 S.W. 151 (Tex. Com. App. 1923).

[7]As was said by the court in Neblett v. Neblett, *supra* note 6: "In seeking to discover the intention of the parties it is far safer for courts to rely upon their assertions and statements made at the time and reduced to the most solemn and stable form of writing, than to explore uncertain and disconnected circumstances, remote in time and occasion, and from such circumstances reason back to the transaction and thus discover its nature."

[8]Wainwright Trust Co. v. Stern, *supra* note 6; Chambers v. Chambers, *supra* note 4; Brown v. Long Bell Co., 138 Miss. 548, 103 So. 353 (1925); Deer v. King, *supra* note 6; Chapman v. Kellogg, *supra* note 6; Owens v. Jackson, 35 S.W.2d 186 (Tex. Civ. App. 1931).

[9]Mitchell v. Ryan, 3 Ohio St. 377 (Ohio 1854).

[10]Campbell v. Campbell, *supra* note 6; Hodgson v. Dorsey, *supra* note 6; Middleton v. Ball, *supra* note 6; Chambers v. Chambers, *supra* note 4; Mason v. Mason, 231 S.W. 971 (Mo. Sup. 1921).

[11]The reason for this requirement is well expressed in an opinion by a Mississippi court as follows: "Registration of conveyances is provided for by law to give strength and security to title; and while registration is not necessarily a delivery it is sufficient to give rise to a presumption of delivery which cannot be overcome by fragmentary and equivocal evidence." Neblett v. Neblett, *supra* note 6. *See also,* Campbell, *supra* note 6, and Hodgson v. Dorsey, *supra* note 6.

[12]*Supra* note 9.

time; and he could not later rebut the presumption of delivery without clear and convincing proof that it was not his intention to convey when he recorded the deed. And where the grant was beneficial to grantee his acceptance was presumed in the absence of proof to the contrary. And the Mississippi Supreme Court has said previously that a grantor, after delivery of a deed for recordation, cannot say that he had not by an overt act evidenced his delivery in an acceptable manner.[13] The jurisdictions that follow the rule that delivery of a deed for recordation is prima facie evidence of its delivery place the burden of proof on the grantor to show that there was no delivery.

On the other hand, the courts who follow the rule that delivery of a deed for recordation is not prima facie evidence of its delivery place the burden of proof upon the grantee to show that there was intent by the grantor to effectuate a valid delivery.[14] For example, Massachusetts says that the leaving of a deed by the grantor with the register for record, and the recording of it, do not constitute a delivery even though by having it so recorded the grantor meant to pass the title and supposed that he had done so.[15]

The decision of the Mississippi Supreme Court in the present case concurs with the general rule concerning delivery of deeds under such circumstances. It also seems to be sound public policy. Registration of conveyances is provided in order to give strength and security to title. It is difficult to see any purpose in the grantor's act of recording the deed, unless it is to evidence to the world that he has transferred title to someone else and is making that fact known by his overt act of recordation.

Robert Allen Walker

Taxation—Taxable Income—Anticipatory Assignment of Future Income by Dividend of Worthless Notes

Taxpayer, having notes which previously had been charged off and deducted as worthless in its income tax return, made a distribution of them to its stockholders, who subsequently collected them. Taxpayer contended that it did not realize any income, and that collections made on notes subsequent to their distribution as a dividend in kind[1] are not taxable to the corporation which distributed the dividend but to the distributee—stockholders. Held: Taxpayer having recovered its capital investment in the notes as a deduction for a bad debt, the notes assumed the status of income. By the dividend taxpayer made an anticipatory assignment of its right to collect the income represented by the amount of the notes, and the amounts collected were taxable income to the taxpayer. *Commissioner of Internal Revenue v. First State Bank of Stratford,* 168 F.2d 1004 (C.C.A. 5th, 1948).

If the taxpayer, after having taken the deductions, had kept and collected the

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[13]Chapman v. Lott, 144 Miss. 841, 110 So. 793 (1927).

[14]Barnes v. Barnes, 161 Mass. 381, 37 N.E. 379 (1894); Egan v. Horrigan, 96 Me. 46, 51 A. 246 (1901); McManus v. Commow, 10 N.D. 340, 87 N.W. 8 (1901).

[15]Barnes v. Barnes, *supra* note 14.

[1]"A dividend to a shareholder by a corporation in any medium other than money is a dividend in kind." Commissioner of Internal Revenue v. First State Bank of Stratford, 168 F.2d 1004 (C.C.A. 5th 1948).

amounts due on the notes, the sums so collected would have been taxable income under statute.[2]

In order to avoid this tax, the taxpayer made the distribution of a dividend in kind on a theory based upon the rule of the *General Utilities* case,[3] which developed as a result of *First Savings Bank of Odgen v. Burnet.*[4] In the latter, taxpayer had paid for certain shares of stock in another corporation, and their market value had subsequently dropped to a very low point. It distributed the shares in kind to its stockholders and, claiming that it had suffered a loss, took a deduction of the loss so suffered in its income tax return. The court denied the deduction. It said that there was an actual measurable loss, yet since this was not a "sale or other disposition"[5] of assets, no deduction could be allowed. But, conversely, if the transferred shares had enhanced in value before distribution, no taxable gain could be charged against the distributor.

In the *General Utilities* case,[6] the shares appreciated in value. It was held that the taxpayer "derived no taxable gain from the distribution among its stockholders of the . . . shares as a dividend."[7] The distribution of the stock was not such a "sale or other disposition" of property as would result in a taxable gain.[8]

Under this rule, if assets increase in value and after such increase they are transferred to the stockholders as a dividend, it does not constitute such a "sale or other disposition" as will make such increase in value a taxable gain. Taxpayer in the principal case, knowing that if it kept the notes and made collections on them it would be taxable under the statute,[9] acted under the assumption that the distribution of the notes as a dividend in kind was not such a "sale or other disposition" as would show a taxable gain.

Yet, the *General Utilities* rule did not relieve the taxpayer of a taxable gain in the instant case. Under the statute,[10] if the taxpayer kept and collected the amounts due on the notes it would have been taxable on the amounts so collected, because by taking the deductions the notes' status changed, for income tax purposes, from being representatives of assets to being representative of income.[11]

Once the securities are determined to be representative of income they cannot be

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[2]INT. REV. CODE § 22 (b) (12), 26 U.S.C.A. 22 (b) (12), which provides that an amount received upon a debt previously charged off and allowed as a deduction constitutes taxable income for the year of recovery, where a federal income tax liability was reduced in a prior year by reason of the deduction taken.

[3]General Utilities and Operating Co. v. Helvering, 296 U.S. 200 (1935).

[4]53 F.2d 919, (App. D.C. 1931).

[5]The court was interpreting the Revenue Act of 1918, § 202(a) (40 STAT. 1057. 1060), now found at 26 U.S.C.A. 115 (1).

[6]General Utilities and Operating Co. v. Helvering, 296 U.S. 200 (1935).

[7]*Id.* at 206.

[8]First Savings Bank of Ogden v. Burnet, 53 F.2d 919 (C.A.D.C. 1931).

[9]INT. REV. CODE § 22 (b) (12), 26 U.S.C.A. 22(b)(12).

[10]*Ibid.*

[11]National Bank of Commerce of Seattle v. Commissioner of Internal Revenue, 115 F.2d 875 (C.C.A. 9th 1940), wherein the court said that repayments to taxpayer after the loans have been charged off and the taxpayer has recouped its capital by deducting the losses from the profits are taxable income, since the debt then represents portion of income which was not taxed.

distributed to the stockholders in such a manner as will make the *General Utilities* rule apply.[12]

Since in both the cases[13] which developed the *General Utilities* doctrine the property there distributed was deemed to be representative of capital assets, it would appear also that this rule could not be applied to securities which are representative of income. If securities become worthless and deductions are taken, they then become representative of income, and it would seem that the person to whom such a tax benefit has been bestowed cannot avoid tax liability by making an assignment in anticipation of the future income from the securities.

Jase O. Norsworthy

Tax Sales—Admissibility of Parol Evidence to Clarify Ambiguities as to Method of Sale

An ambiguity appeared in the tax collector's record of lands sold to the State of Mississippi and assessed to *A*. Only one assessment of the entire tract had been made, but the tax collector's list of sales by separate number indicated separate sales. The record was capable of two interpretations: that separate sales of contiguous tracts were made with respect to separate tax assessments, and that a single sale only was made. Section 3249 of the Mississippi Code of 1930 provided that the tax collector in disposing of land for delinquent ad valorem state and county taxes and in selling contiguous tracts of land belonging to the same owner, whether they be separately assessed or not, must offer the contiguous tracts as an entirety.[1] The tax collector certified that the sale was made pursuant to the requirements of law. Held: Testimony of private persons who were bidders at the offering for sale of the land in question fourteen years before was admissible to show whether the sales had

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[12]In view of Helvering v. Horst, 311 U.S. 112 (1940) and Helvering v. Eubank, 311 U.S. 122 (1940), which cases firmly established the doctrine of anticipatory assignment of future income, the owner thereof cannot avoid tax liability by disposing of his right to collect the income represented by it. The exercise of that power to procure the payment to another is the enjoyment and hence the "realization" of the income by him who exercises it.

[13]First Savings Bank of Odgen v. Burnet, 53 F.2d 919 (App. D.C. 1931); General Utilities and Operating Co. v. Helvering, 296 U.S. 200 (1935).

[1]Miss. Code Ann. § 3249 (1930) provided as follows: "How sale made.—On the first Monday of April, if the taxes remain unpaid, the collector shall proceed to sell the land, or so much and such parts of the land, of each delinquent taxpayer, as will pay the amount of taxes due by him, and all costs and charges, to the highest bidder for cash. He shall first offer forty acres, and if the first parcel so offered do not produce the amount due, then he shall offer another similar subdivision and so on until the requisite amount be produced, or until all the land constituting one tract and assessed as the property of the same owner be offered. Upon offering the land of any delinquent taxpayer, constituting one tract, if no person will bid for it the whole amount of taxes and all costs, the collector shall strike it off to the state. The sale shall be continued from day to day within the hours for sheriff's sales until completed; but neither a failure to advertise nor error in the advertisement, nor error in conducting the sale, shall invalidate a sale at the proper time and place for taxes, of any land on which the taxes were due and not paid; but a sale made at the wrong time or at the wrong place shall be void. And any person sustaining damage by reason of any failure or error of the tax collector may recover damages therefor on his official bond."

actually been made pursuant to Section 3249 of the Mississippi Code of 1930.[2] *Claughton v. Leavenworth,* 37 So.2d 776 (Miss. 1948).[3]

Ambiguities that may arise within an instrument are usually of two natures. The first, a patent ambiguity, is one that appears on the face of the instrument, and which occurs when the expression of an instrument is so defective that a court of law, placing itself in the situation of the parties, cannot ascertain what they meant.[4] The second, a latent ambiguity, is one which is not apparent on the face of the instrument, but is concealed within the terms used in it. Extrinsic evidence cannot be used to clarify an instrument containing a patent ambiguity, but is admissible to aid one containing a latent ambiguity.[5]

The courts also have created an intermediate classification, which has some characteristics of both latent and patent ambiguities and which is called "self-contained" latent ambiguities. Justice Story made reference to this classification in *Peisch v. Dickson.*[6] The Supreme Court of Mississippi in the case of *Schlottman v. Hoffman*[7] discussed the nature of patent ambiguities and quoted Justice Story upon the existence of an intermediate class of ambiguities in these words: "Where the words are all sensible, and have a settled meaning but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties," the ambiguity has a nature that is both latent and patent, and parol evidence is admissible to determine the intent of the parties.[8]

In the case under consideration, the court classified the ambiguity existing upon the tax collector's record as falling within the definition of *Schlottman v. Hoffman.*[9]

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[2]*Ibid.* Section 3249 was amended by Miss Laws 1938, Extraordinary Session, c. 69, whereby there was added the following sentence:

"Each separate assessment as it appears and is described on the assessment roll shall constitute one tract for the purpose of sale for taxes, notwithstanding the fact that the person who is the owner thereof, or to whom it is assessed is the owner of or is assessed with other lands, the whole of which constitute one entire tract, but appear on the assessment roll in separate subdivisions." *See also* Carter v. Moore, 183 Miss. 112, 183 So. 512 (1938).

[3]See also earlier appeals in this case in Claughton v. Leavenworth, 197 Miss. 606, 19 So.2d 815, 20 So.2d 821 (1944).

[4]4 JONES, COMMENTARIES ON EVIDENCE § 1548 (2d ed. 1926).

[5]Justice Story in Peisch v. Dickson, 1 Mason 9, 19 Fed. Cas. 123, No. 10,911 (C.C.D. Mass. 1815), dealt with patent ambiguities and latent ambiguities in the following words: "Nothing is clearer than the general rule,—latent ambiguities may be removed by parol evidence, for they arise from the proof of facts aliunde; and where the doubt is created by parol evidence, it is reasonable that it should be removed in the same manner. But patent ambiguities exist in the contract itself; and if the language be too doubtful for any settled construction, by the admission of parol evidence you create and do not merely construe the contract." A patent ambiguity is apparent on the face of the instrument while a latent ambiguity is raised by extrinsic evidence. From Justice Story's opinion, the court will receive evidence of the surrounding circumstancs and collateral facts, so as to place itself in the situation of the parties at the time of executing the instrument in regards to a patent amiguity, but if there still remains incurable and hopeless uncertainty, it cannot be cured by extrinsic evidence. On the other hand, since a latent ambiguity arises from extrinsic evidence which makes the meaning of an instrument uncertain, the same kind of extrinsic evidence is admitted to remove it.

[6]*Ibid.*

[7]73 Miss. 188, 18 So. 893 (1895). *See also* Jefferson v. Walker, 199 Miss. 705, 26 So.2d 939 (1946).

[8]*Ibid.*

[9]*Ibid.*

After determining that extrinsic evidence is admissible to clarify an ambiguity of the self-contained latent type, the first issue to be considered is what evidence is admissible to attack ambiguities affecting tax sales and their validity, when the tax collector has certified that sale has been made in pursuance of the law. Generally, the tax collector or his deputy making the sale is not competent to impeach its validity. An officer cannot impeach his own official conduct. Where the testimony of the officer making the sale has been admitted, it alone is insufficient to overthrow the prima facie case made by the official record. This was the result reached in *Mixon v. Clevenger*,[10] and more recently in *Neal v. Shepard*.[11] The official record carries with it the presumption that the sale was made in compliance with the legal requirements. When the officer certifies that the land was sold according to law, it is considered that he performed his duty in that behalf, in the absence of evidence on the list of lands sold or other proof to the contrary.[12]

If the testimony of the tax collector or his deputy making the sale is not admissible, what testimony is available? The presumption of validity of the tax sale arising from the tax collector's certification that his conduct was "pursuant to law" will have to be overcome. When the validity of a tax sale was attacked in the *Wilkinson* case, the fact that the same tax sale list disclosed that other and different lands assessed to other owners on the same list had been invalidly sold was held to be insufficient to show that the collector may have failed also to offer and sell correctly the lands involved in that suit.[13] In *Cox v. Richardson*[14] the parol testimony of the purchaser of the land sold at the tax sale as to the manner of sale was held to be admissible. The court said that the purchaser must stand upon his deed, and if his testimony was allowed, it would in effect reform the tax deed.

In the instant case the testimony of two persons in attendance at the sale as bidders was allowed to show that, fourteen years prior to the trial, the tax collector improperly offered contiguous tracts of lands not as an entirety. The bidders did not recall the course of conduct in the particular sales involved, yet the court justified the use of such testimony on the basis that the course of conduct for other tax sales on that date indicated its probable application to the sale of A's property. The custom and practice must have been continuous and systematic, and the evidence was said to be sufficient to establish that fact.[15]

Delbert Hosemann

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[10]Mixon v. Clevenger, 74 Miss. 67, 20 So. 148 (1896).

[11]Neal v. Shepard, 157 Miss. 730, 128 So. 69 (1930), *sugg. of error overruled*, 128 So. 583 (1930).

[12]Jones v. Seward, 196 Miss. 446, 16 So.2d 619 (1944), dealt with the manner of offering lands for sale for tax purposes and set out the inference to be drawn from the certification of the tax collector that the sale had been made "pursuant to law".

[13]The court in State v. Wilkinson, 197 Miss. 628, 20 So.2d 193 (1944), also found a presumption that the tax collector performed his duty properly upon his certification in the absence of evidence on the list or other proof to the contrary, but that circumstance would not in itself be sufficient to overcome the presumption. *See also* Mitchell v. Tubb, 107 Miss. 221, 65 So. 216 (1914) and Alvis v. Hicks, 150 Miss. 306; 116 So. 612 (1928).

[14]Cox v. Richardson, 186 Miss. 576, 191 So. 99 (1939).

[15]32 C. J. S., Evidence § 581 (1942).

Torts—Application of Federal Tort Claims Act to Claims by Soldiers

Plaintiffs, an injured soldier and the administrator of a deceased soldier, brought action under the Federal Tort Claims Act to recover damages for injuries received by one soldier and for the death of the other. The accident resulted from the negligence of a civilian employee of the United States Army, in the operation of an army truck. The two soldiers, brothers, were on furlough and were riding with their father in a private automobile on a public highway, and were not engaged in any business connected with their army service, at the time of the accident. Held: No recovery could be had from the United States under the Federal Tort Claims Act, for injuries received by soldiers. It was not the real intention of Congress, nor the purpose of the Act to cover such persons. *United States v. Brooks*, 169 F.2d 840 (C.C.A. 4th, 1948).

The purpose of the Federal Tort Claims Act[1] was to do away with the system of resorting to the introduction in Congress of private tort claim bills. Prior to the enactment of the Statute, Congress was burdened with a large number of bills for private claims. This was the only remedy open to such claimants. The Act repealed prior miscellaneous methods of disposing of claims for personal injuries or death caused by the negligence of an employee of the United States while acting within the scope of his office or employment. The Act specifically repealed, among other legislation, the Military Personnel Claims Act.[2] That Act had allowed a recovery for damages suffered by military personnel while acting within the scope of their employment, or otherwise incident to non-combat activities of the War Department or the Army.

Because Congress specifically excluded military personnel whose claims were based on personal injury or death which occurred as an incident to their military service, it would seem that Congress considered military personnel whose claims were not incident to service to be within the coverage of the Act. The court, in refusing the claims in the principal case, has engrafted an exception into the Tort Claims Act which Congress apparently refused to enact.[3] As pointed out in the dissenting opinion, it is not reasonable for the court to assume that the import of the general language used in the Act was not understood, or that the exclusion of soldiers, as to injuries received in line of duty, was mere inadvertence.[4]

The plaintiffs, in the principal case, contended that since the Act contains twelve exceptions[5] the maxim *expressio unius est exclusio alterius* should be applied in construing the Act. Where express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute. In such a case there is a strong inference that no other exceptions were intended. The rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all cases not excepted, and excludes other exceptions or the enlargement of exceptions made.[6]

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[1] 60 Stat. 856 (1946), 28 U.S.C. § 921 *et seq.*
[2] 42 Stat. 725 (1922), 31 U.S.C. § 223 (1940), as amended, 57 Stat. 62 (1943).
[3] H. R. 181, 79th Congress, 2d Sess., § 402 (8) (1946).
[4] United States v. Brooks, 169 F.2d 840 (C.C.A. 4th 1948).
[5] *Supra* note 1, § 421.
[6] 50 Am. Jur. 455-456.

Plaintiffs were eligible under the former Military Claims Act to seek redress by a private-claim bill, since their claims did not occur as an incident to their military service. When Congress repealed that statute, it apparently intended that a claimant who was eligible to seek redress by way of a private claim bill might sue under the Tort Claims Act.[7]

Courts should construe statutes in a reasonable manner. Exceptions must be read into many acts to avoid injustice, oppression, or absurd consequences. In this case, however, more injustice and absurd consequences are brought about by engrafting the exception into the Act. The fact that a man is wearing an army uniform should not exclude him from his right to sue and recover under the Federal Tort Claims Act.[8]

A. W. Jordan, Jr.

Torts—Liability of Charitable Institutions for Injuries to Patients

Plaintiff was a patient in defendant's hospital. While under the influence of an anesthetic, he was badly burned by hot water bottles placed upon his arm by nurses in charge. Plaintiff brought suit under the doctrine of respondeat superior. Later when it was established that the hospital was classified as charitable, he amended his declaration to depend upon the original negligence of the defendant in the employment of its nurses. Held: Liability in this case is not referable to the doctrine of respondeat superior, but must depend upon the original negligence of the defendant in the employment of its nurses. Judgment of plaintiff reversed because of erroneous instructions. *International Order of Twelve of Knights and Daughters of Tabor in Mississippi v. Barnes,* 37 So.2d 487 (Miss. 1948).

The recent decisions of other courts show that there is a tendency to reduce the immunity from liability of charitable institutions in an effort to correct a doctrine which was wrong from the beginning.[1] This doctrine is usually based on one or more of three theories: (1) that it contravenes public policy;[2] (2) the trust fund theory;[3] (3) that there can be no liability under respondeat superior because of the absence of gain to the master.[4]

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[7]*Supra* note 1, § 131.

[8]Samson v. United States, 79 F. Supp. 406 (S.D.N.Y. 1947)

[1]Rickbeil v. Grafton Deaconess Hospital, 74 N. D. 525, 23 N.W.2d 247 (1946); Brigham Young University v. Lillywhite, 118 F.2d 836 (C.C.A. 10th 1941); Georgetown College v. Hughes, 130 F.2d 810 (App. D.C. 1942); Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 So. 344 (1940).

[2]Magnuson v. Swedish Hospital, 99 Wash. 399, 169 P. 828 (1918); Vermillion v. Woman's College, 104 S.C. 197, 88 S.E. 649 (1916); Morrison v. Henke, 165 Wis. 166, 160 N.W. 173 (1916); Schumacker v. Evangelical Deaconess Society 218 Wis. 169, 260 N.W. 476 (1935).

[3]This theory is based upon the idea that the donor's gift constitutes a trust for the particular purpose of the charity. Eastman Gardner Co. v. Parmenter, 111 Miss. 813, 72 So. 234 (1916); Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465 (1930); McClod v. St. Thomas Hospital, 170 Tenn. 423, 95 S.W.2d 917 (1936). For discussion of this theory as applied to cooperative power companies see Ethridge, *The Liability in Tort of Cooperative Power Companies,* 14 Miss. L. J. 190 (1942).

[4]Hearns v. Waterbury Hospital, 66 Conn. 98, 33 A. 595 (1895); Siidekum v. Animal Rescue League, 353 Pa. 408, 45 A.2d 59 (1946); Schau v. Morgan, 241 Wis. 334, 6 N.W.2d 212 (1942).

In objecting to the first of these, it is simply necessary to pose the question: which is more in keeping with public policy, immunity or liability? Today, liability insurance is but another cost of operation, and it seems to be more in the public interest to find liability. The government itself has waived its immunity.[5] One encourages care and diligence in protecting the public; the other fosters neglect. Yet in the leading Mississippi case of *Mississippi Baptist Hospital v. Moore*,[6] it was held that even though the institution involved had liability insurance to cover the negligence, there could be no liability.

The inconsistency of the trust fund theory is that the court proceeds to destory the trust by finding liability where there has been negligence in the selection of personnel, and yet preserves the trust where the personnel selected have been negligent in the task assigned. This is the one exception that the Mississippi court has made in the instant case and it is also a prevalent exception in this country.[7] It seems inconsistent to hold that the trust is destroyed in one instance and ignore the fact that it does the same thing in the other. If there is a justification, it must be found to be a matter of degree.

In the 1937 case of *Rhodes v. Millsaps College*[8] the Mississippi court held the charitable institution liable where the injury resulted from a private business that the institution engaged in. This was decided even though all of the funds derived from the business were used exclusively in connection with the charity's primary objective. The case cited seems to be evidence of the court's recognition that there is something wrong with the doctrine when carried to its logical conclusion.

In exempting charitable institutions from the doctrine of respondeat superior, the foundations of the doctrine are ignored. These are that the master is held liable because he has control and authority over the servant.[9] Further, every person or corporation, when acting personally or through its agents, will be required to exercise care so as not to injure another, except on penalty of answering in damages.[10]

There is a fourth idea upon which immunity is sometimes based—the implied waiver theory.[11] This is predicated upon the idea that the recipient of charity should be precluded from recovering from his benefactor for the negligence of servants administering the charity. This theory, although accepted by some courts, has been severely criticized by others.[12]

The principal case indicates that the Mississippi Supreme Court has not followed the modern trend of reducing or abolishing the immunity which charitable institutions

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[5]Federal Tort Claims Act, 60 STAT. 842(1946), 28 U.S.C.A. § § 921-946 (Supp. 1946).

[6]156 Miss. 676, 126 So. 465 (1930).

[7]Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465 (1930); Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 P. 1008 (1918); St. Vincent's Hospital v. Stine, 195 Ind. 350, 144 N. E. 537 (1924).

[8]179 Miss. 596, 176 So. 253 (1937).

[9]*See* Lichty v. Carbon County Agr. Ass'n., 31 F. Supp. 809 (M.D. Pa. 1940); Andrews v. Y.M.C.A., 226 Iowa 374, 284 N.W. 186 (1939); Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940)..

[10]*Ibid.*

[11]Pepke v. Grace Hospital, 130 Mich. 493, 90 N.W. 278 (1902); Powers v. Mass Homeopathic Hosp., 109 F. 294, 47 C.C.A. 122 (1901).

[12]Sheehan v. North County Community Hospital, 273 N.Y. 163, 7 N.E.2d 28 (1937); Gamble v. Vanderbilt University, 138 Tenn. 616, 200 S.W. 510 (1917); Tucker v. Mobile Infirmary Ass'n., 191 Ala. 572, 68 So. 4 (1915).

have so long enjoyed. An example of this trend is found in the State of Illinois, where until recently no liability could be found even though insurance covered the institution.[13] In 1947 the Illinois court overruled that precedent and held that where insurance did in fact exist there would be liability because the trust fund would not be impaired.[14] There is nothing in the facts of the instant case to indicate whether or not the institution had insurance, but as previously mentioned this court found no liability when last confronted with this problem.[15]

J. B. Holleman

Wills—Attestation—Signing by Witnesses on Envelope Containing Will is Not Sufficient Attestation

Testatrix signed a paper written for her by another, intending such paper for her will. The paper was placed in an envelope and the envelope was sealed. On the front of the envelope testatrix wrote in her own hand: "My last will and testament." Two witnesses who were present when these acts were performed affixed their signatures on the envelope under the inscription. Held: The paper in the envelope was not entitled to probate as the signatures of the witnesses were not on the same sheet of paper as that which contained the testatrix's own signature, nor were they upon a paper physically connected with that sheet. In re *Lee's Estate,* 80 F. Supp. 293 (D. D. C. 1948).

The refusal by the court in the instant case to admit the paper to probate was based chiefly on the ground that the envelope and the paper were not sufficiently attached in a physical sense so as to be considered one instrument. As a general rule it is required that the attesting witnesses sign on the will proper or on some sheet physically connected with the will.[1]

However, the Mississippi Supreme Court in the case of *Bolton v. Bolton,*[2] was not as strict in determining what constituted physical attachment. Probate of the will was allowed even though the second witness did not sign the paper which had been executed by the testator and signed by the other witness, but signed on a printed acknowledgment blank which was folded up with the will by the testator. The court followed the general rule in holding that a will could be sufficiently attested when the witnesses signed on a separate sheet from that of the testator provided these sheets were physically attached. By folding the sheets together the testator was said to have physically connected the two papers and by that formed a completed will which was properly attested.

Other courts in America have not been as liberal in analogous situations as was the Mississippi court in the *Bolton* case. But these decisions have not been based entirely upon the refusal of the courts to hold that the envelope and the paper inside were not physically attached. Where the statute of the particular state makes it mandatory that the witnesses sign at the end of the will, the courts have found no

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[13]Piper v. Epstein, 326 Ill. App. 400, 62 N.E.2d 139 (1945); Myers v. Y.M.C.A., 316 Ill. App. 177, 44 N.E.2d. 755 (1942).

[14]Wendt v. Servite Fathers, 76 N.E.2d. 342 (Ill. 1947).

[15]*Supra* note 6.

[1]*In re* Dunlap's Will, 87 Okla. 95, 209 P. 651 (1922); *In re* Estate of Moro, 183 Cal. 29, 190 P. 168 (1920); *In re* Baldwin's Will ,146 N.C. 25, 59 S.E. 163 (1907).

[2]107 Miss. 84, 64 So. 967 (1914); *cf.* Johnston v. King, 250 Ala. 571, 35 So.2d 202 (1948).

difficulty in holding that the subscribing by the attesting witness on an envelope containing the intended will is not sufficient.[3] In cases where the enclosed paper was entirely in the handwriting of the deceased, but unsigned, and the signature of the testator appeared on the envelope, such instruments have not been allowed probate as holographic wills because they were not considered to have been signed by the testator according to the statute governing holographic wills.[4] Regardless of the belief and intent which the testator might have had that the instrument was to be his will, it is the intention of the legislature which controls. The statute in the subject case only requires that the witnesses attest and subscribe the will.[5] No place for their signatures is prescribed. This language was interpreted by the court to mean that the witnesses' signatures must be on the same sheet as that of the deceased, or on some sheet physically connected thereto.[6] The Mississippi statute requires that the witnesses merely attest the will.[7] As to the place of the signatures of the witnesses, it is said that all that is necessary is that they write their names at any place upon the will with the intention of witnessing it.[8]

In a few instances the courts have held that the envelope and the sheet of paper it contained constituted a valid will.[9] The will was considered to be composed of the envelope, the writing of the testator thereon, and the enclosed paper. Since a will may be written on separate sheets of paper, it was reasoned that the envelope and the paper were merely separate sheets which went to make up the will and which should be read together.

English courts have also upheld the validity of wills which consisted of a sealed envelope and an enclosed paper which disposed of the property of the deceased.[10] These decisions seem to be based on the theory of incorporation by reference.[11] The indorsement or writing on the envelope, having been duly executed and having made reference to the paper inside, is said to have incorporated such paper into one instru-

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[3]*In re* Perrine's Will, 109 Misc. Rep. 459, 180 N.Y. Supp. 333 (1919) (an unsealed envelope); Vogel v. Lehritter, 139 N.Y. 223, 34 N.E. 914 (1893).

[4]*In re* Manchester's Estate, 174 Cal. 417, 163 P. 358 (1917); *In re* Tyrell's Estate, 11 Ariz. 418, 153 P. 767 (1915) (the paper was not considered signed by the testatrix even though she wrote out her name in the body of the will).

[5]D. C. CODE § 19-103 (1940).

[6]*Accord:* Shane v. Wooley, 138 Md. 75, 113 A. 652 (1921); Soward v. Soward, 1 Duv. 126, 62 Ky. 126 (1863).

[7]MISS. CODE ANN. § 657 (1942).

[8]Murray v. Murphy 39 Miss. 214 (1860).

[9]Alexander v. Johnston, 171 N.C. 468, 88 S.E. 785 (1916) (an unsigned holographic will, the signature of the testatrix being on the envelope); *In re* Harrison's Estate, 196 Pa. 576, 46 A. 888 (1900); Fosselman v. Elder, 98 Pa. 159 (1881) (the paper in the sealed envelope was said to be more secure and more safe from fraud, alteration, than were separate sheets of attached paper).

[10]*In the* Estate of Mann, [1942] 2 All Eng. 193 (P.) . . . "If an unattached paper is to be admitted at all, there is much to be said in favour of an envelope, which may reasonably be held to have a far closer relationship to a document which it encloses than a second and wholly disconnected piece of paper. Envelopes are, by their nature, designed to have what may be described as a dependent and secondary existence, rather than an independent and primary life of their own."; *In re* Almosnino, 1 Sw. & Tr. 508, 164 Eng. Rep. 834 (Prob. 1859). *But cf.,* In the Estate of Bean, [1944] 2 All Eng. 348 (P.)

[11]The envelope and the document therein were upheld as constituting one testamentary document on the theory of integration in the case of *In re* Nicholls, [1921] 2 Ch. 11.

ment. It also appears that the courts in admitting these papers to probate give weight to the fact that there is little possibility of a fraud being committed by the changing of the contents of the sealed envelope.

Should similar circumstances arise in Mississippi, it would seem that the decision of the instant case would not be followed. In view of the holding in the *Bolton* case, the necessary physical connection between a sealed envelope and its contents could not be denied. And in the absence of a statutory provision prescribing the place for the signatures of the attesting witnesses, a subscribing by them on the envelope would appear to be a sufficient attestation to the paper to which it is attached.

Willam J. Hamm

RECENT BOOKS

This department undertakes to note or review briefly current books on law and matters closely related thereto. Periodicals, court reports, and other publications that appear at frequent intervals are not included. The information given in the notes is derived from inspection of the books, publisher's literature, and the ordinary library sources. The information given in the reviews is derived from a personal reading of the book by the individual whose name appears at the bottom of the review.

BRIEF REVIEWS

OUTLINES OF THE LAW. By V. A. Griffith. Indianapolis: The Bobbs-Merrill Company, pp. 752, 1949. $10.00.

Since the Civil War Mississippi has produced a number of outstanding lawyers and judges, able men who were proficient in both theory and practice of the law. They knew the law, they could teach it, they could present it logically in courtroom or public debate; but they did not and have not done one vitally important thing: they have not yet turned to writing the law. They have been vocal enough and literate enough, but they have not been literary. The mass of both substance and procedure has been neglected, save for Supreme Court decisions and little-read law journal articles, with the result that most of the treatises used today by both lawyer and law student in Mississippi are written by outsiders. Speculation as to the reason for this failure on the part of our legal leaders would perhaps be interesting; at any rate, with every third Mississippian apparently writing or hoping to write a novel, it is to be hoped that the Bar will shortly feel the creative urge.

Without doubt the leading exception to this legal literary vacuum in Mississippi has been and is former Chief Justice Virgil A. Griffith. His *Chancery Practice* appeared in 1925; even though we have since been shaken by successive cataclysms of depression, New Deal, war, the atomic bomb and States-Righters, the value and usefulness of the book continue, as its present unavailability amply attests. In his second major treatise, *Outlines of the Law,* Judge Griffith has presented an analysis of the principal rules and exceptions contained in the whole body of today's Anglo-Saxon jurisprudence, an analysis resulting from his practice and study of the law for more than a half-century.

It might be of interest to note the high points in his career since his admission to the Bar in 1898, as an indication of the pervasive effect that his career has had on the law and its administration in Mississippi. Judge Griffith began practicing law in Ellisville, moved to Biloxi in 1899 in partnership with James H. Neville, and then to Gulfport in 1904 in the firm of Bowers, Neville and Griffith. In 1920 he became chancellor of the Eighth Chancery District and immediately began work on material for his handbook of chancery practice. Two years later Judge Griffith served as chairman of the committee appointed to draft modernized procedure for equity courts; the committee's draft became substantially the Act of 1924, by which chancery courts are still governed; and this statute of 1924 was only last year used as the basis of the act altering civil practice in the circuit courts.

In the year following the appearance of *Chancery Practice,* he was requested by a committee of the legislature to draft an act for the creation of county courts; the draft became the law of 1926, creating the present county court system. Election to the Supreme Court occurred in 1928, and the year also saw his appointment as a

member of the Code Commission for the Code of 1930, to which body he contributed a great deal of effort, including the preparation of the index.

In the depression of the early thirties, with the consequent financial and educational distress of the state, and public apathy toward democratic processes, it became imperative that primary election laws be revised and strengthened. At the request of the State Democratic Executive Committee, Judge Griffith submitted a draft of a proposed election law, which the Legislature adopted as the Corrupt Practices Act of 1935. Culmination of his distinguished career came with his elevation as chief justice upon the death of Judge Sydney Smith.

In *Outlines of the Law,* which is dedicated to Chief Justice Arthur T. Vanderbilt, Judge Griffith says prefatorily that the book is designed for use by ". . . practicing attorneys, law students, candidates for admission to the bar, business college instructors and students and the many law officers who are not members of the bar but to whom a comprehensive statement of the principles of American law in one convenient volume would be helpful."

Here is the crucial problem of a treatise writer. The abilities and interests of this combination of potential readers vary widely. The chief need of the legal novice is explanation, while the practicing lawyer is looking for thorough analysis. What is vital for the beginner is elementary for the practitioner. Can an author outline the law in one volume and at the same time satisfy both amateur and professional? In this book I think Judge Griffith has achieved considerable success in doing just that.

The volume is divided into twenty-two chapters, with the first four being a general discussion of the common law, the nation and the state. Each of the remaining chapters is devoted to a specific field of the law, beginning with domestic relations, going to personal property and real property, on through contracts and torts, and so on to the last chapter, which is concerned with admiralty law. The rules in regard to each subject are stated concisely, and footnotes rather than the text are used to show Mississippi cases or statutes involving disagreement with or variation from the general rule.

Criticism can perhaps be levied against the book on two counts, and each of these objections results from difficulties inherent in the task attempted, rather than the author's lack of abilities. The placing of an outline of the law in a single volume inevitably means, on the one hand, a too-generalized statement of some of the rules. On the other, there is the unavoidable necessity that some items be entirely omitted.

An example of the first of these instances is Judge Griffith's statement in regard to interstate commerce: ". . . the prescribed formula is that the means or instrumentality is or becomes interstate in character when its use, at the time in question, is directly and immediately related to interstate commerce and that relation is so close or intimate as to make the instrumentality or means practically a part of such commerce, . . ." He adds that this definition is sadly deficient but is as close as the courts have got, which is certainly true. But there are no cases cited, and adequate understanding of the problems involved in the question of "direct relation" to interstate commerce is had only by examining the cases in which the Supreme Court has held an activity within and those cases holding the activity without the scoue of the clause.

As examples of items which the author has been compelled to omit, the chapter on equity contains no discussion of contempts and the distinction between civil and criminal contempts. There are separate chapters on criminal and civil procedure,

but an analysis of instructions with the many relevant Mississippi cases had to be left out. Nor is there any discussion of the distinction between jurisdiction and venue, which, in view of the Mississippi Supreme Court's propensity for the phrase, "territorial jurisdiction," might have been helpful.

But on the whole, these two general objections do little to vitiate the quality of the book.

These days it is always interesting to note a legal writer's views as to what the law is, what it should be, where we got it: all those attitudes we combine in the generic term, "philosophy of law." Judge Griffith believes that the law is not always common sense, "nor does it undertake to conform throughout with what is termed the moral law, . . ." with both of which ideas most of us can agree. He also believes that the common law had its primary sources "in natural justice and enlightened reason"; and further, that the law "is not a system of arbitrary and stilted declarations and decrees, but is a science founded in reason and experience, with only a measure of that which has grown out of expediency or practical polity,"—from both of which ideas there may be an occasional gentle dissent.

Without getting into the natural law versus positivism controversy raging for many years and now being continued in the *American Bar Association Journal* (where it is sometimes difficult to tell whether the objective is to invalidate positivism or to restore the dignity and authority of William McKinley, Mark Hanna, Senator Wherry, *et al*), it is at least arguable that the law is not a science, that no phase of human relations is "scientific," and that such a viewpoint is not deplorable but desirable. Far from being a scientific certainty, the law as defined by some is mainly a collection of compromises, based almost entirely on expediency or practical polity, guided by the reason and experience of the presiding judge. And if this is correct, so the argument goes, there is no need for lamentation. For just as inflexibility is the *sine qua non* of totalitarianism, so expediency in reconciling the claims of antagonistic pressure groups is the lifeblood of democracy.

As concerns the merit of the book, however, these considerations are doubtless unimportant. This treatise should be well received, and the Bar will await with interest the publication in 1950 of Judge Griffith's revised *Chancery Practice,* and later publication of a projected manual of circuit court practice and procedure.

*Huey B. Howerton, Jr.**

THE FEDERAL INCOME TAX: A GUIDE TO THE LAW. By Joyce Stanley and Richard Kilcullen. 822 Madison Ave., New York 21, The Tax Club Press, 1948, pp. 344. $6.00.

Anyone who has had occasion to handle a problem involving a federal tax question of some complexity has encountered the maze of statutes of the Internal Revenue Code with all its definitions, references and labored language along with similarly patterned Treasury Regulations. The authors of the book under review have done an excellent work in condensing and intergrating into readable laymen's language nearly all of the important provisions of the Code, insofar as it affects the income tax, with the necessary regulations and leading court decisions.

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At first blush one is apt to question the need for the length and verbosity of the statutes and Regulations. However, the statutes apply, and must be written to apply, to a myriad of situations—to every type of existing situation and also to every conceivable situation which can be devised by the minds of lawyers, accountants, business men and economists.

For a long time it has been unwise from a business standpoint to ignore the importance of tax questions even in the everyday transaction. The income tax law applies in some manner to all persons. Benefits under the sections of the Code allowing deductions, exclusions and exemptions, and providing for a lesser tax if the transaction is of one character rather than of another, have resulted from the effort to apply the tax in accordance with the particular situation of the taxpayer. This has had the tendency to result in further complications. Also, different language and application must be employed with reference to corporations, partnerships and other forms of enterprise. The net result is that there has been created a statute in which these benefits are more often than not overlooked, because of the complicated arrangements of the Code and because of the use of new words or words with special tax significance; so that, to one not a specialist, the Code is often meaningless without a tremendous amount of research and reading and re-reading.

The importance of the income tax law to everyone is immediately apparent when one considers that past a certain point of income, relatively low at the present time, approximately a minimum of one-fifth of one's endeavor to produce income is expended on income taxes. As one's income increases this fraction of effort expended increases more rapidly than the increase of income. The modern lawyer, accountant or business consultant in advising his clients must constantly keep in mind the various aspects of how his client will be affected by income taxes. Often it is difficult even for the expert to place a particular question into a particular category from which to begin research.

The first source to be consulted for an answer to a tax question is the Internal Revenue Code itself. All will agree that it is not advisable to rely on memory as to what any particular provision of the Code contains. When referring to the Code one is confronted with the complex verbiage of the statute consisting of definitions, words of art, exceptions, negatives, parentheses, references to other sections and definitions, so that in most instances it is necessary to read not only the particular section under consideration, but several other sections which contain similar complexities themselves, necessitating hours of study for the answer to a more or less simple question. Seldom does the Code present a clear cut, short and positive statement without exceptions on any subject. The Regulations follow this pattern, and court decisions can be understood only in the light of the statute and the Regulations.

The need for a cmopact book employing more simple language and shorter construction of sentences has long existed. Joyce Stanley and Richard Kilcullen, in *The Federal Income Tax: A Guide to the Law,* meet this need admirably. Moreover, they have been able to write this book so as to explain the meaning of a section without requiring the reader to refer to several other sections in order to understand what the particular one says and does. The task of translating into layman's language and quick reading material has been well performed, and is comparable in effort to that of drafting the statute itself. Moreover, where necessary,

the Regulations and court decisions are highlighted with equal deftness. The red light is turned on those questions which are unsettled in the courts, thus warning the reader of things which might come.

This book is what its title states it to be: A guide to the law. It pretends to be nothing more. And yet, its authors have managed to encompass witnih 344 pages a wealth of material ordinarily found in much more lengthy volumes, and an excellent and valuable index which is a most useful part of the book. It does not discuss the reasoning of courts in a critical light nor compare the reasoning in the decision of one problem with the decision of a similar or related question. Rather, there is stated the holdings of the courts and in some instances the reasoning which would be a guide in a decision on a similar but undecided question. This fact serves to limit the confusion of the one not already familiar with the question.

The arrangement of the book is convenient. The authors have not attempted to quote the Code nor the Regulations, but assume that the reader has before him the publications. The various sections follow the key numbers of the Code and Regulations, and when one desires to read the exact language of the statute or regulation he may simply turn to that section bearing the same number as the section being studied. The heading of each section of the Code is retained as the heading of the corresponding section of the book, but under the heading of each section there is called to the attention of the reader in bold type matters which relate to that section but are not stated in the law. For instance, at the top of page 15, in the section dealing with income we find in bold type, "Section 22 (a) (General Definition)." This much is identical with the Code. The explanation under this, however, describes the Code section and gives the numbers of the applicable Regulations. Under this same section and in bold letters also is a sub-heading, "General Income Concepts." Under this is given a discussion of subject matter indicated and a warning of the question of Income v. Capital, the necessity of realization of income to be taxable income, the constructive receipt theory, questions of transfers in trust and differences between assignment of income and transfer of property.

None of these matters were in the statute. But they exist as a result of regulation and court decisions.

The following pages then take up the applicable Regulations defining various transactions as producing or not producing income. Where appropriate, the authors refer to leading cases deciding various questions, giving their facts and holdings and calling them usually by the name by which they have now come to be known, but giving their formal citation in the footnotes.

The whole book is written on the above pattern. As can be seen, this results in convenience and speed in research. The book is not exhaustive and consequently cannot be used without other material. The reader should have before him the Code and latest Regulations. For instance, on page 238 there begins a discussion of the "Net Operating Loss Deduction," which explains the meaning and result of the corresponding section of the Code, but does not set out in detail all the adjustments to be made in taking such a deduction. It would be advisable to read the Code first, then this section in the book, then the applicable Regulations, and then pertinent sections of one of the larger income tax services before attempting to take a net operating loss deduction. The explanation in this book,

however, will save much time for those who have not already ascertained the meaning and result of Section 122 of the Code.

Again, in Section 115, under the heading "Source of Distribution," at page 200, it is stated that it is conclusively presumed that every distribution is out of earnings or profits to the extent thereof, and that for a distribution to stockholders to be taxable it is not necessary that it be pro-rata or with a formal declaration of dividend. A refinement of the question develops the further information that if a distribution is in good faith a repayment of a loan by the stockholders to the corporation, such distribution may not be taxable even though there were earnings or profits. The authors, however, indicate that there may be circumstances such as this when at the end of this subsection they state that "the question whether a particular distribution is 'in the nature of a dividend' depends on the particular facts." The larger works must be consulted for refinements.

The Federal Income Tax is a book which should be close to each lawyer, accountant or tax consultant for ready reference and explanation in a broad, general way for most income tax problems. The general practitioner who is not a specialist will find especially much use for it in learning many of the pit-falls of the income tax law and in indicating that one tax result will occur if a transaction is handled in one manner and that another result can be achieved if the transaction is handled in another way. It will explain to him the different tax concepts. The tax specialist, though he deals daily with many phases of the income tax law, will find this book useful in ascertaining the meaning of sections of the Code which are hazy from non-use. Indeed, it is a rare expert who does not need refreshment. I heartily recommend *The Federal Income Tax* to all lawyers, accountants and tax practitioners as an excellent guide through the maze presented by the Internal Revenue Code, the Treasury Regulations and the thousands of court decisions which make up the body of income tax law.

*Sydney A. Smith, Jr.**

PROTECTING OUR CHILDREN FROM CRIMINAL CAREERS. By John R. Ellingston. New York, Prentice-Hall, Inc., 1948, pp. 374. $5.00.

John R. Ellingston, a special advisor on criminal justice for youth for the American Law Institute, is well qualified to discuss this most important subject. As field representative of the Institute, he has had a fine opportunity to watch first-hand and continuously the problems that confront states and communities in dealing with the youth of our country. He draws on his vast storehouse of information obtained from actual experience, and gives, not only his own views, but those of recognized authorities on this, probably the most discussed topic of our time. He treats his subject in a very clear and concise manner, and his book is most interesting and readable.

The book is divided into three parts: Part I, entitled "The Background," consists of four chapters in which the author discusses the problems of youth in general, giving the cause, the psychological clues to delinquency, and the best improved methods and the understanding of human behavior. He reminds us that no one who knows how the administration of criminal justice protects society

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from delinquency and crime and criminal careers is very happy about the results. Old remedies and new are being tried, more punishment, life sentences for repeaters, fines and jail terms for the parents of delinquent childrn, more and better trained police, juvenile and adolecent courts, indeterminate sentence, probation, child-guidance clinics, foster-home placement, cottage-type correctional institutions, parole, big brothers, settlement houses, boys' clubs, police athletic leagues, vocational schools—these are but a few of the procedures and institutions put forward to combat delinquency and crime, but even these have not proved good enough. Then he raises the question, "What accounts for this national penchant for delinquent and criminal behavior, and how shall we explain our seeming inability effectively to curb that behavior?"

Part II, entitled "Correction at the State Level," consists of eleven chapters. The author discusses the launching of a youth authority, its work and the details of the plan, the prevention and treatment, the set-up regarding schools and correctional institutions. He describes in detail the chaos, cruelty, injustice, and ineffectiveness of the traditional criminal justice administration, and analyzes the fallacies on which it is based. The comparison with his description of the new system as tried in California makes one wonder that so sensible and simple improvement in one vital area of the relations between the state and the individual should have been so tardy in making its appearance.

In Part III, "Services to all Youth at the Community Level," consisting of sixteen chapters, the author discusses the many general causes of crime and delinquency. He points out that the sponsors and administrators of the Youth Authority Act in California and other states have seen in the Authority a means of combining rehabilitation of young offenders with systematic aid to communities, to enable them to do a better job of preventing delinquency and of serving all youth.

In the Appendix he discusses "The Adult Authority" and the best improved methods of dealing with criminals in general. He sets forth the experience of those who designed the model Youth Correction Authority Act and its workings, and gives the most advanced thought in the treatment of crime, the experience of the Federal Corrections Act of 1942, which combined an Adult Authority with a Youth Authority in an attempt to provide scientific handling for federal lawbreakers of all ages. He discusses the evils of the old system and gives the improved methods, such as diagnosis and guidance centers, the individual treatment of prisoners, the question of parole and parole officers and their work in returning men to society as law-abiding citizens. He points out that the transformation of a penal system into a true correctional system involves profound psychological and social as well as organizational changes. The study and application of the problems as related by the author could be of great help to our own state if we would apply them to our situation.

The motto of this book might well be a sentence from the autobiography of the late Ray Stannard Baker: "I am suspicious of those who would change institutions without changing the understandings upon which they rest." It is his belief that the ineffectiveness of so many efforts to correct delinquency and criminal behavior and to prevent delinquency results largely from tinkering with institutions while ignoring the systems of thought upon which they rest. Consequently, this book seeks to get at and to appraise ideas and beliefs—those behind

the familiar agencies and procedures for preventing delinquency and for serving youth, and those especially behind the new procedures and institutions that are evolving under state leadership in California, Minnesota, Wisconsin and Massachusetts.

Ellingston describes in detail the setting up of The Youth Authority in California and the operation of the plan. He helps us further with an organizational chart which shows the different officers and services and institutions entering into the plan.

This is a well written book, and the author shows that he is conversant with the best thought of people who are experienced in handling youth problems.

*M. F. Pierce**

EDUCATION FOR PROFESSIONAL RESPONSIBILITY. A Report of the Proceedings of the Inter-Professions Conference on Education for Professional Responsibility held at Buck Hill Falls, Pennsylvania, April 12, 13, and 14, 1948. Pittsburg, Carnegie Press, Carnegie Institute of Technology, 1948, pp. 203.

This is not a book in the usual sense, and is, therefore, difficult to review briefly. As stated in the Foreword:

> An 'Inter-Professions Conference on Education for Professional Responsibility' was held at Buck Hill Falls, Pennsylvania, on April 12, 13, and 14, 1948, for the interchange of experience and ideas by teachers in schools of divinity, medicine, law, engineering, and business. The Conference was planned because it had become increasingly clear that the major problems of professional education are common to all professions, and that unusual opportunities for fruitful discussion of these problems are provided by the variety of experience of teachers in different professions.

Following the Conference it was decided to publish as a unit the papers which constituted the formal part of the Conference. This book is the result and contains within its covers sixteen different papers presenting diverse aspects of the subject, "Education for Professional Responsibility," as well as an introduction by Elliott Dunlap Smith, Provost, and Maurice Falk Professor of Social Relations, Carnegie Institute of Technology, and the opening remarks of the chairmen of the different sessions.

There were three sessions of the Conference, one dealing with the objectives of professional education, another with content and method in professional education, and the third with the social and humanistic aspects of professional education.

The authors of the papers were teachers in the fields of divinity, medicine, law, engineering and business. Since it would be impossible within the scope of a brief review to do justice to all sixteen of the papers presented in these five major fields, since the Conference was in full agreement that the major prob-

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lems of professional education are common to all professions, and since this *Journal* finds its way primarily into the hands of lawyers, we may be pardoned for limiting this discussion to the papers presented by the law teachers and dealing with the subject of education for professional responsibility in the legal profession alone.

In dealing with the objectives of professional education, Lon L. Fuller, Carter Professor of Jurisprudence at Harvard University, points out the four competing conceptions of the objectives of legal education and examines the virtues, limitations, and dangers of each of these conceptions. The first such conception is that the object of legal education is to give the student *knowledge.* Those adhering to this position argue that the faculty of a law school should study carefully what branches of law are most important today and arrange the curriculum so as to impart the knowledge most needed in modern law practice. The author claims that this standard for the organization of the curriculum enjoys a diminishing popularity. The changing demands of modern law practice make it impossible to predict what the student will need to know after his graduation. The real service of the law school is to teach men to think like lawyers. Content is important, not so much for itself as for its significance in the attainment of other objectives.

The second conception, which the author considers probably the most fashionable today, is that the object of legal education is to impart *skills.* The slogans of this conception are: skills, techniques, the art of advocacy, the art of counselling. The author believes "that the greatest danger now confronting American legal education is that this conception will be taken too seriously and applied too literally. For as soon as an attempt is made to employ the skills-and-techniques conception as the exclusive standard for organizing legal education, the whole educational process is disoriented and cheapened." This conception furnishes no real test of what or how men ought to be taught. Lawyers need to be able to reason logically, to reject irrelevancies, to detect unstated premises, to read and listen with understanding, to argue persuasively, to fathom motives, and to write and speak good English. The author quotes Woodrow Wilson to the effect that the man who sets about to achieve "character" makes himself ridiculous. It is the by-product of a quest for other goals. Similarly, skills and techniques on the part of a lawyer should be the by-product of the case method of instruction that concentrates on problems rather than on the self-improvement of men.

The third conception is that true education, in law as in every other calling, consists in exposing the student to *great minds.* This, according to the author, is well and good, but the danger is that those who stress this conception overstate their case to the point of asserting that the organization of the curriculum is of no importance at all. Their subservience to this conception leads them to ignore organizational problems and to accept without question the curricular organization that was worked out decades ago.

The fourth conception, and the one favored by the author, is that the object of legal education should be to give the student an understanding of, and an insight into, the processes in which the lawyer participates. The lawyer is usually the most active and responsible participant in two basic social processes: adjudication and legislation. Adjudication presents him in his role as advocate, judge, or office counsellor. These activities center about a single process, that

by which controversies are argued and decided. On the other hand, the legislative process presents him in his rule-creating, structure-giving role—as a planner, negotiator and draftsman. In using the term legislation the author refers not merely to the planning and drafting of statutes, but to the negotiation and drafting of contracts and other private documents. Thus, the term is used in its broadest sense. It is the contention of the author that the purpose of legal education should be that of conveying an understanding of these two basic processes and the curriculum of the law school should be organized with this purpose in view. It would unduly prolong this review to undertake to set forth the details of his conception as to how the curriculum should be organized in order to effectuate this purpose. So, with a mere statement of the purpose, we shall have to content ourselves by referring the interested reader to this excellent paper itself.

In the session dealing with "Content and Method in Professional Education," Carl N. Llewellyn, Professor of Jurisprudence in the Columbia University Law School, discusses what he terms the current crisis in legal education. The discussion revolves around the use or rather abuse, of the case system. While he approves, generally, of the use of that system for teaching law, he points out that there is no such thing as the case system, because there so many variations of case teaching. The first limitation imposed by this method is that the court's more or less authoritative answer to the problem by the facts of the case is provided in advance. When students are provided with a set of answers the job of getting them to focus attention on the technique of solutions rather than on the answers is difficult. Law teachers using the system are prone to view organization of a course as consisting rather of subject matter than of the skills of the lawyer. There is a wide range of approach in individual use of case-class techniques. Two of the most striking lines of variation are what may be called approaching the case from the front, on the one hand, and approaching it, on the other hand, from the rear. The latter takes the decision primarily as something done and complete. This is related to the "answer" and the "subject matter" approach to the material. The more vital approach "from the front" is an approach to the case as a problem for solution, not as a problem already solved. In this it appears that the student takes the materials at hand, or the problem posed by the facts of the case, and more or less substitutes himself for the appellate judge in solving the problem, even if he arrives at a different result. The author's criticism seems to be that either of these lines of approach, with the analysis and decision already made by the appellate judge before the student, throws off by-products of analysis, of training in orderly thought, and to some extent in argument. Where the principles around which the discussion revolves are principles of law, then the principles of effective craftwork must come in for less conscious attention and for much less adequate development. The author favors a great intensification of problem-discussions, but recognizes that a stepping up of this method will reduce the number of problem situations dealt with in any course down to a third or even to a tenth. There is a hugely growing quantity of information about subject matter which is needed for competence in the discipline. The pressure to expand the amount of "just plain law" has greatly increased the tendency in case teaching to concentrate upon subject matter at the expense of training in craft-skills.

Briefly the author proposes to meet this situation by using the case method more and more for imparting professional skill and by encouraging the student to do more and more outside reading and research for his information about the

rules of law; by making the various legal craft-skills now inculcated by indirection in the first year case-classes the explicit focus of the first year so as to bring the student to the second year already trained to read judicial decisions and to use them with some professional competence; and by putting the law reviews to wider use under which the better men may be brought into jobs of research, synthesis, criticism, and expression.

Arthur T. Vanderbilt, formerly Dean of the New York University School of Law and now Chief of Justice of the New Jersey Supreme Court, discusses the necessity of directing the interests of the student toward public affairs, and for performing their obvious duties as citizens. He points out the fact that not only do we lack any real interest in public affairs but that the average citizen has very little knowledge of our government. On the average, little over fifty per cent of eligible citizens are interested enough even to go to the polls and vote. Many of our so-called best citizens use every excuse and artifice at their command to avoid jury service, a fundamental duty on which so many of our liberties depend. The practice on the part of citizens to "fix" traffic tickets and thus circumvent the law is condemned. Judge Vanderbilt urges that professional men should assume their obligations as leaders of public opinion and some degree of responsibility for political party management, and that the ablest among them should be willing to assume the rigors of public office. Good citizenship should be developed in the homes, in the churches, and in the schools and colleges.

In another interesting paper entitled "Human Nature and Training for Law Practice," Dean Wilber G. Katz of the University of Chicago Law School points out the impossibility of discussing problems of method in even the strictly professional subjects in law, medicine and theology without considering the broader professional objectives. There is, for instance, the problem of training for policy judgments. One way in which the law school may promote such training indirectly is by having a program of research on important problems of public policy, such as, on national policy for the oil industry, who tax problems affect the supply of rental housing, the effect of labor practices on various programs for the benefit of the public, etc. Dean Katz deplores the microscopically small fraction of law school funds which are devoted to research. The course in Industrial Organization, required in his law school, at least gives the student an introduction to what research in important questions of public policy involves. In connection with the student's need to gain insight into the process of value judgments, the University of Chicago Law School has been experimenting with having the student read and discuss books such as Ranyard West's *Conscience and Society,* Erich Fromm's *Escape from Freedom* and *Man for Himself,* Freud's *Civilization and Its Discontents,* and papers such as Robert G. Knight's "Determinism, Freedom, and Psychotherapy."

In short, all of the authors of all of the papers presented decry the old methods and objectives of the professional schools which concerned themselves solely with subject matter and content and ignored the broader aspects of professional education, which should be designed to equip the student to be a happy and useful citizen of the world. The law school should not be content with merely teaching the student rules of law in order that he may have the tools wherewith to earn a livelihood. That is one of its functions, of course, but according to these authors it is one of the least in importance.

*Hubert S. Lipscomb**

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ANTITRUST LAWS, ET AL *v.* UNIT OPERATION OF OIL OR GAS POOLS. By Robert E. Hardwicke. 29 West 39th St., New York 18, American Institute of Mining and Metallurgical Engineers, 1948, pp. 300.

In the 178 pages of *Antitrust Laws, et al. v. Unit Operation of Oil and Gas Pools,* Robert E. Hardwicke has covered the twenty-five year period which has seen unit operation of oil and gas fields develop from a theory to a realty. Concurrent with this development the author portrays the legal problems inherent in this advance.

The volume is a glowing tribute to Henry L. Doherty, a man of vision, who probably more than any other individual is responsible for the development of the "unit operation". In many respects the book is a challenge to the institution characterized by the word "law". That rapid and progressive technological advances must be likewise met by advancement in the field of law is illustrated by the serious problem confronting unit operators in connection with the enforcement of the United States Antitrust Laws (Sherman Act).

Your reviewer has long doubted the legal security of certain voluntary unit operations. Mr. Hardwicke confirms these doubts and shows the inherent danger, from a legal standpoint, of all types of unit operation.

In the last analysis we are confronted with the question of whether (1) are we going to favor the most progressive and scientific type of oil and gas production, or (2) are we to prefer the benevolent protection of the Federal Government through the enforcement of the Antitrust Laws as a standard of the highest type of personal protection afforded in an individual enterprise. Mr. Hardwicke would expect his reader to select the first.

While not a lawbook in the ordinary sense, nevertheless, *Antitrust Laws, et al. v. Unit Operation of Oil and Gas Pools* will provide a splendid background to the oil and gas student confronted with unit problems.

*Bernard W. Chill**

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*Attorney at Law, Jackson, Miss.

BOOK NOTES

Agency

CASES ON AGENCY. By Edwin R. Keedy and A. Arthur Schiller. Indianapolis, Indiana, The Bobbs-Merrill Co., 1948, pp. 650.

This collection of cases and statutes constitutes a revised edition of Keedy's *Cases on Agency,* originally published in 1924. The arrangement of the cases follows that of the first edition. Some cases contained in the first edition have been omitted and other cases, for the most part recent, have been added. A number of statutes, repealing or modifying common law rules, have been included in the new edition.

Corporations

CASES AND OTHER MATERIALS ON PRIVATE CORPORATIONS. By I. Maurice Wormser and Judson A. Crane. Indianapolis, Indiana, The Bobbs-Merrill Company, 1948, pp. 1055.

This casebook is based on the Third Edition of Canfield and Wormser's *Cases on Private Corporations,* revised by I. Maurice Wormser in 1932. Since that time there have been a number of significant decisions and in many states the corporation laws have been thoroughly revised.

Religion

CONTEMPORARY RELIGIOUS JURISPRUDENCE. By I. H. Rubenstein, Chicago, Illinois. The Waldain Press, 1948, pp. 120. $2.50.

The purpose of this treatise is to clarify and state the civil and criminal aspects of the major polemical tenets of fortune telling, faith healing and pacifism.

History

HEIRS APPARENT—THE VICE PRESIDENTS OF THE UNITED STATES. By Klyde Young and Lamar Middleton. New York, Prentice-Hall, Inc., 1948, pp. 314. $3.75.

This book brings together the biographies of all the Vice-Presidents of the United States. There are thirty-four complete, compact profiles, from John Adams to Harry Truman. It is also a history of the United States from the time of the establishment of the Federal Government to the present time.

ACKNOWLEDGMENT OF BOOKS RECEIVED

SOUTH CAROLINA WORKMEN'S COMPENSATION ACT ANNOTATED. By Earnest B. Castles. Box 575, Anderson, S. C., E. B. Castles, 1947, pp. 180. $10.00.

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